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METHODS OF

Constitutional Construction

THE SYNTHETIC METHOD ILLUSTRATED
ON THE FREE SPEECH CLAUSE
OF THE FEDERAL CONSTITUTION

BY

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WITH THREE SUPPLEMENTS BEARING ON THE
RIGHTS OF REVOLUTIONISTS BY
JAMES MILL, J. L. DELOLME AND JOHN CARTWRIGHT

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FOREWORD

"Dear Sir:

"We are returning to you under separate cover the interesting article we had the pleasure of receiving from you, with regret that we cannot use it.

"In passing perhaps it would not be out of the way to suggest that it gives the impression that its author, like the judges it is aimed at, has allowed himself to be carried away by prenatal-predispositions."

Thus wrote the "Editor in chief" of a prominent law review in returning the manuscript which is hereinafter published. Among those who are displeased or disappointed with the conclusion of the following essay there will be those inclined to echo the sentiment of this editor and obtuse enough to complacently consider this an adequate disposition of the whole discussion. I frankly accept the implied criticism of my ability to make any essential phase of my meaning clear to *any such minds.*

I do not claim exemption from predispositions. With all of us reasoning is admittedly but an effort to justify our predispositions. But I do make conscious effort (here perhaps I may justly claim to differ from some lawyers) toward habitually founding my predispositions upon a confidence in the scientific method and its impersonal results rather than upon attachment to concrete doctrines of advantage to self, to friends, or class. Of course it may be that in this effort I have failed utterly. Even so, it is hoped that I can make it clear to some readers that I am not merely pitting my predispositions against those of others or my personal desires as such, against the personal desires of others.

The challenge of the following essay is that every predisposition be submitted to the check and justi-

fication of the scientific method, and here I have merely tried to point out the requirements of that method as applied to some legal problems. However much the readers will dislike the conclusions arrived at, I hope that those of mature intellect will devote themselves to discrediting the scientific method in general, or to discrediting my conception of it. Everything else is irrelevent.

Those who feel themselves in possession of a lawless power and who are therefore beyond the need for justifying their conduct, and those who are too indolent or too dull to do so will of course be content to ignore the issue I am most anxious to present, namely: the value of synthetic method of constitutional construction.

THEODORE SCHROEDER.

METHODS OF CONSTITUTIONAL CONSTRUCTION

The mental operations by which our constitutional liberties receive "construction" are naturally classified into three distinct categories, viz: the analytic, the historic and the synthetic processes. As applied to constitutional law, these three categories embody the essentials of the scientific method and it is of the highest importance to the progress of juridical science that lawyers and judges acquire a clearer idea of its requirements.

From a time long antecedent to that in which Englishmen executed forty judges for their unrighteous judgments, lawyers and courts have been objects of suspicion and contempt in minds uninfluenced by the sophistry of our legalolatrists. My conviction is firm that our laws and courts will continue to receive such disrespect until there is a better understanding of both the cause and the cure of the malady. The purpose of this paper is to point these out.

Psychologists inform us that all reasoning is but an attempt to justify our predispositions. Space limits here preclude a psychogenetic study of predispositions. It is enough to say that judges are not free from them nor is society exempt from their evil influence. I think I may safely add that the predominating judicial predisposition is never a singleness of devotion to clearly-conceived requirements of the scientific method. As sympathy or interest inclines them toward the aspirations of the masses or the pretensions of the mighty, judges are necessarily pre-

disposed in favor of either a government from out of the people or a government from over the people. Thus lawyers and judges become definitely arrayed in two groups of conflicting predispositions—the liberal and the strict constructionists. The more intelligent will be conscious of their status and more or less consistent in their adherence to the standards of their group and will be most plausible in defending their predispositions. They will, indeed, do almost anything except make a thorough introspection as to the source or nature of these predisposing influences or definitely adopt the scientific method for checking them.

Despite an ostentatious display of the "judicial temperament" the legal scientist sees plainly the nature of the predisposition in the conspicuous absence of the factors by which well disciplined minds consciously impose upon themselves the check of the scientific method. In the hope of increasing both the inclination and the capacity for using the scientific method I will proceed to elucidate it and illustrate its use. Perhaps I should remind the reader that the first requisite to the scientific method is confidence in its results, no matter how these may conflict with our desires or interests.

THE ANALYTIC METHOD OUTLINED

The analytic method is based upon the assumption that the constitution declares general principles or that in its guarantees of liberty it implies general criteria of liberty which are to operate as a controlling restraint upon the conduct of all public functionaries. Hence the object of the analytic method is to ascertain from the actual wording of the constitution and by a strictly deductive process, the exact meaning and application of its implicit or explicit general principles upon any particular piece of legislation or specific official act. If we are not to encourage judicial lawlessness, this means that the criteria of constitutionality must be both general and certain

and, for the purpose of the analytic method, must be derived exclusively from the very words of the constitution and not dogmatically forced into it. This is a distinction which some courts have declared to exist,[1] but heretofore the proper implication of the distinction between reading from and reading into the constitution has usually been ignored in the judicial cerebrations. Furthermore, failing to understand and apply the scientific method, our judges also fail to check their unreasoned emotional predispositions and so have practically reduced our constitutional liberty to a matter of mere uncontrolled judicial whim. The intelligent observer sees in their dogmatic reference to the constitution nothing more than a transparent pretext to justify the judicial prejudice. Elsewhere I think I have demonstrated this to be a fact with reference to our constitutional guarantee of unabridged "freedom of speech and press."[2] This situation is equally apparent upon other subjects and is shown by the judicial opinions which devote themselves to a discussion of what the judge thinks the constitution ought to be rather than what its framers meant to make it.

These defects in intellectual process are equally apparent and quite as uniformly present whether the immediate effect is to uphold or to deny a particular right claimed. It is an intellectual shortcoming not called into existence by the necessities of either the liberal or the strict constructionist, as such, but arising from the inadequate intellectual development of our judges. Under such circumstances, even when a claim of liberty is sustained by judicial dogmatism nothing whatever has been gained for general liberty.

So far as constitutional law is concerned, dogmatic liberty is liberty by permission, a mere phase of slavery, because the next judicial dogmatist,

[1] State vs. Payne, 29 Pac. Rep. 787; McCluskey vs. Cromwell, 11 N.Y. (1 Kern.) 593-602.

[2] "Obscene" Literature and Constitutional Law, Chap. 10, entitled "Judicial Dogmatism on Freedom of the Press."

through a like exercise of arbitrary power, has equal authority for the contrary conclusion. The casual suspense of despotism is not a destruction of despotic principles or power. The former depends on the virtue or caprice of tyrants, political, economic, judicial. The latter depends upon the intelligence and force at the command of the governed. Judicial "discretion" is not inherently different from judicial caprice. Government by a judiciary unrestrained by clear and unequivocal general principles, is in fact a lawless government; its activities embody every evil element of despotism acting *against law*. All liberty by permission is despotism no matter how well the formalities of law and democracy seem to be observed, nor how well we are trained to humble prostration of intellect before the idol-precedents established by our legalolatrists.

THE HISTORICAL METHOD OUTLINED

When it seems to justify some predisposition, our courts say that the "constitution should be read in the light of its history and of the understanding of the whole American people when the grant was made."[3] This shows that the judges realize *some* connection between historical events and constitutional construction, but the use they make of this knowledge only betrays the crudity of their notions as to the nature of that relation. In the first place, it is absurd to talk of a consensus of opinion among the "whole American people." The American people as a whole had but few and crude ideas about problems of liberty and the leaders were frankly divided in their opinion upon the province of government as well as upon the guarantees for protecting liberty which should be incorporated into the constitution. Of course, in the language used each contestant hoped that future generations would see his own predisposi-

[3] Gibbons vs. Ogden, 9 Wheat 1; 6 Law Ed. 1; see also Scott vs. Sanford, 19 Howard, 393. 15 Law Ed. 691. Reynolds vs. U.S., 98 U.S., 162; Boyd vs. U.S., 116 U.S., 616-622-625; Carolina vs. U.S., 199 U.S., 437.

tions, although sometimes necessity for compromise may have made the language designedly vague. At all events, it is manifestly ridiculous to talk about "the whole American people" at that time as having the same opinion about constitutional liberty. A clearer conception of the historical method as applied to constitutional construction would have compelled the courts to see that some of its provisions represent a compromise between conflicting theories of government and liberty, though usually they represent a decisive victory of one of the contesting factions.

Rightly to understand the historical method means to enquire into those issues of principle which were the essence of the antecedent agitation, which conflicts our constitutions were designed to decide. The fact that this method of contrasting pre-revolutionary contentions as a means of constitutional interpretation has never been judicially used, shows the want of understanding by which our courts are habitually hampered.

Such defective conception as to method makes it easy for our courts to refer to history and quote some historic opinion as a precedent to justify whatever predisposition is controlling the momentary whim of the judicial mind. When a court wishes to justify a cherished preconception in one case, it may quote approvingly Jefferson's resolution on toleration passed by the Virginia Legislature.[4] In another case, when the same court wishes to abridge freedom of utterance, it will unhesitatingly repudiate the above by approving Blackstone's contrary conception of toleration.[5] Now they overlook the fact that there was great need to "uncannonize Blackstone" as Jefferson wrote.[6] To those who know no more

[4] Reynolds vs. U.S., 98 U.S., 163.

[5] Patterson vs. Colorado, 205 U.S., 454; 4 Bl. Com. 151. "Liberty of the press consists of printing without any previous license, subject to the consequences of the law." King vs. Withers, 3 Term Reports 430. This was the conception of liberty of the press which always obtained among tyrants after 1694, when the licensing act was repealed. It is this conception which our supreme court endorses.

[6] Letter 104 to Judge Taylor, June 17, 1817, edition of 1829.

about the scientific method than do such judges, and to those who have predispositions similar to those held by them, these two irreconcilable definitions of intellectual freedom will seem equally plausible and conclusive and the mind will remain utterly unconscious of the existence of any conflict.

THE SYNTHETIC METHOD OUTLINED

By the synthetic method of constitutional construction is meant the co-relation of all constitutional provisions which define and restrict governmental authority. The synthetic method is based upon the assumption that each of these limitations and guarantees is a part of a general idea of liberty and that only by understanding each part in its relation to all other parts may we arrive at an all-inclusive generalization thereafter to be applied deductively and decisively to each concrete problem of freedom and to each separate constitutional guarantee of a partial or particular liberty.

I believe that our courts without exception have utterly failed to show the least acquaintance with synthetization as a method of constitutional construction. Our judges are far removed from even a speaking acquaintance with the scientific method for developing a general concept of liberty. Consequently they lack the means of acquiring a practical working criterion for determining the constitutional limits between liberty and the police power with the result that they do much worse than merely dogmatize or to attempt some crude empiric inductions about it. The courts tell us that the limits of liberty and the police power have not been defined and are in their nature indefinable.[7] Thus our courts undertake authoritatively to make their own intellectual bankruptcy the limit of the intellectual evolution of the race. It is pathetic but apparently inevitable that

[7] In re License Cases, 46 U.S., 504-583-592; 12 Law Ed. 256. Comm. vs. Alger, 7 Cush, 53-85. Leavenworth vs. Miller, 7 Kas. R. 501; Reeves vs. Corning, 51 Fed. Rep. 774-785.

such men should so largely determine the destiny of human society in thus stifling the development of a rational conception of liberty. In concluding this essay I will indicate tentatively the criteria of the limits of liberty and the police power.

THE SCIENTIFIC METHOD PRACTICALLY ILLUSTRATED

Having now outlined the requirements of the scientific method, I shall illustrate somewhat briefly how this method may be applied in the interpretation of the free speech clause of the Federal Constitution.[8] I select this because it seems to me the more fundamental of our liberties and for the further reason that I can make this illustration more brief than I could any other by occasionally pointing to some published essay of mine for greater elaboration. I have tried to analyze the words of the first amendment[9] to show that freedom of utterance is abridged whenever a man is punished for the mere psychologic offence of expressing his thoughts, that is, whenever he is suppressed or punished except on the basis of an ascertained, actual and material injury or the imminent danger thereof according to the known laws of the physical universe. This standard would permit the fruitless advocacy of every disapproved doctrine even including treason. Especially because of the clearness of the constitutional language in this clause it has seemed to me that the results of the analytic process are conclusive, and yet they do not satisfy all the requirements of the scientific method.

While persisting in doubts founded upon conservative predispositions, the result thus attained may be checked by the historic method, as I have in-

[8] For an abstract statement of the scientific method see: *American Law Review,* June, 1908, reprinted in Chap. 18 of "Obscene" Literature and Constitutional Law. See also: Interstate Commerce, Employers' Liability and the Supreme Court, in *Government,* June, 1908.

[9] Vol. 68, *Central Law Journal,* pp. 227, 234,, Mch. 26, 1909; revised in Free Speech for Radicals, Chap. 4. Again in "Obscene" Literature and Constitutional Law, Chap. 8.

dicated. This I have also done elsewhere and I believe I have justified the conclusion already stated.[10] Perhaps there the issues were not as exhaustively treated as they might have been, yet the process is clearly enough illustrated. Especially important in this connection is the declaration of the Continental Congress (which I had not then seen) in which it is said that freedom of the press must be maintained as a means "whereby *oppressive officials are shamed and intimidated* into more honorable and just modes of conducting affairs."[11] Likewise, I then overlooked the fact that the United States Supreme Court had once endorsed as authoritative that fine statement of Jefferson's as embodied in Virginia's Act of Toleration, in which it is said that *"it is time enough for the rightful purpose of government for its officers to interfere when principles break out into overt acts against peace and good order.*[12] This criterion of the limits of toleration is applicable to every possible case of freedom of speech and press but it is hardly to be expected that the Supreme Court will adhere to it when in some future case it shall come into conflict with its preconceptions. Our courts are not yet controlled by principle, or only when in their narrower vision the expedience of particular results can be justified by principles.

There is another check, perhaps only a subdivision of the historic method, which can also be applied. The academic defences of intellectual freedom can be separated into two classes—those which only advocate more freedom than was contemporaneously conceded and those defences which are for an unabridged freedom of utterance. But even the former will confirm our result if we do not confuse the demand for larger liberty with that for unabridged freedom. If we ignore the dogmatic exceptions

[10] *Central Law Journal*, Mch. to June, 1910; "Obscene" Literature and Constitutional Law, Chap. 11.

[11] Address to the inhabitants of Quebec, Oct. 28, 1774; *Journal of Continental Congress*, Vol. 1, p. 108, edition of 1904.

[12] Reynolds vs. U.S., 98 U.S., 163.

which the various authors make, and generalize the reasons or the particular criteria of freedom offered in support of a partial or larger liberty, we will find even here the budding conceptions through which the idea of unabridged freedom of utterance must develop. The reasons urged and the criteria offered for unabridged intellectual liberty upon one subject are not fundamentally different from those which must be applied to secure toleration for every opinion on every subject. An author may regret or even repudiate the consequences, but it is nevertheless true that the arguments and criteria furnished to secure freedom of religious discussion are usually just as applicable to political or sex discussion and to the criticism of our courts and government. Thus all the arguments presented for a growing intellectual liberty[13] by exhibiting the living thoughts which determined the intention and action of the men who framed our constitution, lend us assistance towards finding general criteria for unabridged intellectual opportunity. This in turn becomes a factor in the criteria of general liberty. It is in this way that we can test our working hypothesis first derived by the use of the analytic method. It is only by this method that our judges will be able to check their own predispositions and lust for power.

It seems to me that even this brief outline of the historical method which is but a part of the required checks for a thorough method of constitutional construction is enough to show us how far short our courts have fallen even when they had some glimmer of the true process.

CONCERNING THE SYNTHETIC PROCESS

In illustrating what I mean by the synthetic method I believe I can show that our judges have not even dimly conceived either the possibilities or the process

[13] These are moderately well re-stated in Chap. 5 of "Obscene" Literature and Constitutional Law. For more elaborate original statements see Free Press Anthology.

by which alone the best intellectual results can be obtained. Thus far it has been briefly indicated how, by improving on the old methods, the conclusion may be justified that unabridged freedom of speech and press means that no one shall be hindered in or punished for expressing his sentiments about any subject so long as no actual or material injury has resulted, and even then no punishment shall follow from the sentiments as such, but shall be inflicted solely on the basis of proven actual and material injury. Because of the nature of the method hereinbefore used, the criteria of intellectual freedom were necessarily stated in general terms and without application to concrete problems or a consideration of the related guarantees of liberty. This will now be done. Although this synthetizing process is the least known to the legal profession, yet it is the most important check which can be applied for the confirmation or destruction of the criteria of freedom heretofore indicated.

THE FOURTEENTH AMENDMENT AND CERTAINTY

First, then, let us see what bearing the "due process of law" clause has upon the construction of the free speech clause. So far, apparently our courts have not even dreamed of any connection. In practically all prosecutions for circulating prohibited ideas, the test of criminality has been and is the problematic, speculative and prospective psychologic tendency of an accused idea upon some mere hypothetical reader of the future. Because of the uncertainty of this criterion of guilt, endless opportunity for oppression was offered to the evil-disposed members of spy-societies and of the judiciary. Every one familiar with this chapter of the struggle for freedom against the varying methods for constructing treasons, knows how frequent were the complaints against uncertainty in the criteria of guilt. In the stormy days of George III declamatory patriots

used to describe this judge-made law of treason somewhat in the way that Johnson defines network, as "a thing reticulated or decussated, with interstices between the intersections."

But uncertainty in the criteria of guilt was also the cause for complaint as to other than intellectual crimes, and from the necessity for a remedy against all the evils of uncertainty, arose the maxim, *ubi jus incertum ibi jus nullum.* About a century ago, Mence, in his valuable book on "Libel," while writing about the words *"per legem terrae,"* said: "Whatever else it may or may not mean, in this place there can be no doubt but that it must mean the then known, accustomed and established law of the land, *so opposed to any uncertain and unknown rule."*[14] Such contentions would usually be connected with Coke's statement that all judgments against Magna Charta are void.[15]

Elsewhere I have quite exhaustively discussed uncertainty in criteria of guilt as violative of the guarantees of "due process of law"[16] and yet I cannot refrain from giving some additional references to books where some phase of the subject is mentioned.[17] There cannot be "due process of law" unless there is "law." In any case where all the facts are known there can be no "law" unless the criteria of guilt are so certain that men of ordinary intelligence cannot err nor reach conflicting conclusions as to their criminality. If this conception of law and due process of law is now co-ordinated with our guarantee of una-

[14] Mence on Libel, p. 312.

[15] 2 Coke's Institutes, 527, 77, 87.

[16] "Obscene" Literature and Constitutional Law, Chaps. 18 to 21.

[17] Lord Camden, quoted in Words and Phrases, vol. 3, p. 2069; Lord Andover in a speech in 1640, quoted in the Freedom of Speech and Writing, p. 94; Fortesque's Preface to his Report, pp. 3-4; John Locke, quoted in Observations on the Nature of Civil Liberty, pp. 37-8; John Cartwright, in the English Constitution Produced, etc., pp. 136-7, 143, 276; Rev. C. C. Colton, in "Lacon," p. 83. Ed. of 1832; "The First American Democrat;" Blackstone's Com., Book III, Chap. 8; Sir Thomas Burdette to his constituents (1810) p. 15; 4 Parliamentary History, 115, 117, 118; U.S. vs. Lamkin, 73 Fed. Rep. 463; Justice Brown of U.S. Supreme Court, 34 Am. Law Review, 322.

bridged liberty of utterance, then we must conclude that no form of speech (including printing) can be penalized merely on the basis of a jury speculation about the prospective psychological tendency of the idea upon a hypothetical future reader. In other words, if we construe freedom of speech as a subdivision of that general liberty which, in order to preclude all arbitrary power, in all cases requires absolute certainty in the criteria of guilt, then we again conclude that such freedom of speech and press is abridged if any mere psychological offence is punished. As was said before, the criteria of guilt must include actual and material injury resulting from the dissemination of an idea. Guilt can never be constitutionally predicated upon an uncertain speculation about the uncertain and problematic tendency of an idea upon a future hypothetical reader and actor.

DUE PROCESS OF LAW AND EQUALITY

The one essence of "law" and "due process of law" which has most often received judicial sanction is the proposition that there can be no "law" without equality as to all persons who are similarly situated with reference to the state or society. Thus Jeremy Bentham made equality one of the tests for determining the existence of freedom of utterance in relation to government. According to him, liberty exists if "at the hands of persons exercising the powers of government a man shall have no more to fear from speaking and writing against them, than from speaking and writing for them."[18] At about this same time James Mill also wrote his celebrated essay on "Liberty of the Press" and in the pages devoted to a discussion of equality of intellectual opportunity, he said: "Freedom of discussion means the power of presenting all opinions equally, relative to the subject of discussion; and of recommending them by any medium of persuasion which the author may

[18] The Liberty of the Press, (1821) pp. 23 to 55.

think proper to employ. If any obstruction is given to one sort of opinions, not given to the delivering of another; if any advantage is attached to one sort of opinions, not attached to the delivery of another, so far equality of treatment is destroyed, and so far the freedom of discussion is infringed; so far truth is not left to the support of her own evidence; and so far, if the advantages are attached to the side of error, truth is deprived of her chance of prevailing. To attach advantage to the delivering of one set of opinions, disadvantage to the delivering of another, is to make a choice."[19] It should be added that this equality must be maintained even as between subjects that are unrelated, as mathematics and religion. Freedom is as much abridged if we suppress *all* opinions upon a given subject as when we suppress the the disapproved opinion in relation thereto. This brings us to a special application of Herbert Spencer's formula of freedom which is that it consists in the greatest liberty consistent with an equality of liberty. I wish to digress from the discussion to note that Spencer's formula does not permit of application to cases wherein it becomes necessary to balance mere psychic factors against the material things of life, because in such a case there is no common yardstick by which equality can be measured.

In the absence of actual and material injury, if we punish the publication of falsehood about any particular subject, then we must punish all falsehood pertaining thereto. This, however, can have no application to cases wherein the truth or falsity of a statement is purely speculative or transcendental so that the exact sciences do not yet furnish inerrant standards. The rule of equality is denied whenever we penalize unmerited praise of any given institution without also penalizing the unmerited blame, and vice versa. Likewise, the rule of equality is vio-

[19] On Liberty of the Press, by James Mill in supplement to sixth edition of Ency. Britannica, 1821; reprinted by the Free Speech League, 1912, with introduction by Theodore Schroeder, see p. 27. See also appendix hereto.

lated if we permit impassioned praise without permitting equally impassioned denunciation of government or its officials, etc., etc.

Construing together this aspect of "due process of law" and the free speech provisions of our constitution again we must conclude that freedom of speech is abridged whenever the greatest equal intellectual opportunity or right is not maintained. We must have even an equal right to be wrong. In other words, the just or unjust praise, merely as such, or the passionate or dispassionate denunciation of public officials, laws, governments or revolutions, cannot be penalized without violating the equality guaranteed by our Constitutions. Since in these respects the maintenance of equality has never been possible under any kind of censorship, therefore no statute whatever of this character and upon this subject can be passed without violating the Constitution.

THE SIXTH AMENDMENT

We may now proceed to relate our interpretation of freedom of speech to that provision of the Constitution which guarantees that persons accused of crime "shall be informed of the nature and cause of the accusation." This means that the accused must be informed not only of the facts claimed to have offended, but also the law, the criteria of guilt, by which those facts must be adjudged criminal. In other words, he must be "informed by the law as well as by the complaint what acts or conduct are prohibited and made punishable." "In a criminal statute, the elements constituting an offence must be so clearly stated and defined as to reasonably admit of but one construction. The dividing line between what is lawful and unlawful cannot be left to conjecture."[20]

Therefore if we interpret the free speech guarantee in relation to the Sixth Amendment to the Fed-

[20] U.S. vs. Capital Traction Co., 34 App. Cases, D.C., 592. Czarra vs. Medical Supers., 25 App. Cases, D.C., 443, and cases cited.

eral Constitution, we arrive at the same conclusion as when we connected it with the Fourteenth Amendment, namely: no spread of ideas can be penalized by making the criteria of guilt a mere speculation about an unrealized psychologic tendency. Indeed, the meaning and almost the identical words might be used here which were used in the corresponding occasion herein-above, in stating the argument or conclusion against uncertainty implied in "due process of law."

EX POST FACTO LAWS AND FREE SPEECH

Clearly related to this problem of the uncertainty in the criteria of guilt—where guilt depends upon the psychologic tendency—is the evil of *ex post facto* legislation. When tyrants made no pretence to decency there was no hesitancy about passing laws after the fact to punish some "undesirable citizen" whose conduct did not come within the letter of any existing prohibition. At present one might almost suspect that new methods had been cunningly devised to accomplish the same result without frankly affirming the propriety of creating criteria of guilt *ex post facto*. If legislatures are prohibited from directly enacting *ex post facto* laws they cannot be allowed to accomplish the same end indirectly, merely by the device of leaving uncertain the criteria of guilt and thus delegating to the courts a seeming authority for creating *ex post facto* standards of judgment at the trial of the accused. The abuses by *ex post facto* criteria of guilt were always most conspicuously manifested in cases of political offenders including such as were accused of seditious libel.

Thus an act of 25 Edward III provided that "if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason, till the cause be showed and declared before the King and his Parliament whether it ought

to be judged treason or other felony."[21] This much praised legislation was evidently designed to take from the courts the power to create *ex post facto* criteria of guilt and vest that solely in king and parliament. The American constitutions intended to destroy that authority even as to the legislative body. Unquestionably the idea was to destroy the last possibility of punishing according to *ex post facto* standards of guilt. What congress cannot do directly it cannot do indirectly by handing back to courts the pernicious power which had already been taken from them. The purpose of this guarantee of liberty was to destroy forever the evil of such tyrannous authority, and not merely to take it from the legislative branch in order to place it with the judiciary. Lord Holt, in writing of seditious libel, said that the offence was necessarily left as uncircumscribed as the natural possibility of the injury. "The enactment of the law [in cases of libel] is contained in the punishment of the offence."[22] That is precisely the evil which by the prohibition against *ex post facto* legislation, it was sought to avoid.

Now then, by co-relating this with our free speech provision we again come to the conclusion that unabridged freedom of speech and of the press means impunity in the expression of every idea, as such, and freedom from punishment under any test of the psychologic tendency of the offending article. Consequently liberty of utterance is abridged if punishment follows upon any other condition than that of a proven actual and material injury.

TREASON AND FREE SPEECH

Again I remind the reader that we are not to be frightened away from the synthetic method merely because its results conflict with our emotional predispositions. The necessity for checking our feel-

[21] English Liberties, p. 64.

[22] Holt on the Law of Libel, p. 37, edition 1816. For further discussion of *ex post facto* legislation in this connection, see: "Obscene" Literature and Constitutional Law, Chap. 23.

ings makes this method indispensable for all who aspire to reach conclusions dispassionately.

There are some other provisions of the Federal Constitution which have a very direct relation to the free speech clause. The two I now have in mind are also very intimately related to one another so that it is almost necessary that they be considered together. I refer to the provision that "treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies and giving them comfort." Mere preparation, such as might be useful in war or in resistance to government, but not followed by actual hostilities, is not treason, and to make this still more certain we have the second amendment which reads: "A well regulated militia being necessary to the security of a free state, the right of the people to bear arms shall not be infringed."

I believe that these provisions have the most vital bearing of any part of the Constitution upon the problem of determining the meaning of free speech. Even though this language is plain, its obvious meaning has often been ignored by the courts. The obvious meaning can be reinforced here only by a mere outline of the historical method of interpreting these two constitutional clauses. This will also bring into plain relief the interpretation which it forces upon the guarantee for unabridged free speech.

To begin with, let us look a little into the history of the struggle over constructive treasons and we at once get a new light on the constitutional definition of treason.

The statute of 25 Edward IV was considered a great improvement upon the prior laws of treason because some effort was made toward defining the crime and to that extent it provided a check upon the lawlessness of the judiciary. For even this little relief, this was called the *"benedictum parliamentum."* However, this statute made express provi-

sion for punishing mental treason in whomsoever "doth compass or imagine the death of our Lord the King or our lady the Queen, or of their eldest son and heir."

This reminds us that in the beginning all the abridgments of freedom of utterance were designed solely for protecting the aristocrats in the fruits of legalized injustice and vested wrongs. It would seem that this chief reason for a censorship having disappeared, the censorship itself should go under, but it does not. We have developed some new and sacred custodians of governmental beneficences. After securing some definition of the offence, the next step by which the advocates of greater liberty sought their end was an insistence that to constitute guilt—"to compass and imagine the death of the king"—that undesirable state of mind must be manifested by some overt act in execution of its design and of such a nature as was capable of producing actual and material injury to their majesties. The opponents of freedom insisted that the mere utterance of treasonable ideas was in itself an overt act of treason, and therefore an unexecuted treasonable conspiracy was treason. Under our Constitution a contrary view must prevail.[23] In England the view of tyrants usually prevailed.

"Divers later acts of Parliament have ordained that compassing by bare words or sayings should be treason. * * * It was wont to be said that bare words may make a heretic but not a traitor without an overt act."[24] Whether or not mere words could be considered as overt acts was the dominant issue in this long controversy. Lord Coke was among those who maintained that mere words should not be considered as overt acts. Although it was that controversy which our Constitutions were designed to settle, yet the constitutional definition of treason,

[23] Judge Sprague, in his instruction to the U.S. Grand Jury, Boston, Mch. 1861; U.S. vs. Hanway, 1 Wall, Jr., 139—2 Wall, Jr., 204.

[24] English Liberties, (by Henry Care and William Nelson) p. 69.

standing alone, might still leave the way open for a construction which, by merely changing the name of the crime, could yet punish a treasonable utterance not acted upon. No doubt to close this door to a possible thwarting of the original purpose, the guarantee of unabridged liberty of speech and press was thought necessary.

In view of those pre-revolutionary controversies, it is clear that our free speech amendment must be construed as an aid to the constitutional definition of treason, so as to preclude any punishment of mere treasonable utterance, as such, under any name whatever. If this were not so, then we would be accusing the framers of our Constitution of the imbecility of objecting only to the name by which the abridgment of freedom is designated instead of desiring to protect freedom itself. Thus also, the synthetic method implies more generally that the criteria of punishability for any opinion in addition to its expression must include some overt act—must include actual and material injury or at least the intention to inflict such injury accompanied by some act which (according to the known physical laws, not according to speculations about mere psychic tendencies) were adequate to work such injury.

This brings us to the conclusion that the unabridged freedom of speech guaranteed by the Federal Constitution implies a guarantee of impunity even in the advocacy of resistance to our Government as a whole and by a necessary implication it guarantees impunity in the fruitless and harmless advocacy of lesser crimes. To those who have not considered the question, our conclusion may seem a little startling, and on account of this adverse predisposition it becomes desirable to inquire a little deeper into the reasons and precedents supporting it.

Of course, ideal freedom and justice exist nowhere. Even the modern relatively more refined conceptions of freedom and justice, imperfect as they must be, are still in the making and are of recent

date. In consequence of this the precedents are so uniformly on the side of tyranny that doubtless many will be surprised to find any precedents which will furnish even a little support for a doctrine of liberty so antagonistic to those unreasoned predispositions toward flag-idolatry which we develop in our schools by the hot-house method, and which we miscall patriotism. Yet such precedents do exist.

THE CASE OF REV. HENRY SACHEVERELL

Dr. Sacheverell was impeached before the House of Lords in 1710. This, it will be remembered, was not long after the revolution of 1688. The language of his sermon, which was the chief item of the indictment against him, was restated thus: "That the grand security of our government and the very pillars upon which it stands is founded upon the steady belief of the subject's obligation to *an absolute and unconditional obedience to a supreme power in all things lawful and the utter illegality of resistance upon any pretext whatsoever.*"

In the course of the trial Sir John Holland (p. 115) thus denounced the doctrine of non-resistance: "The doctrine of unlimited unconditional passive obedience was first invented to support arbitrary and despotic power and was not promoted or countenanced by any government that had not designs sometime or other of making use of it." This makes the desirability of resistance at any particular time a matter of expediency and therefore a subject proper and necessary for discussion with equal freedom as between the friends and opponents of resistance.

The Bishop of Norwich (p. 518) in giving his reasons for voting for the impeachment, said: "It is a maxim in politics that all governments are best supported by the same methods and counsels upon

[25] Howell's, State Trials, Vol. 15, p. 1. See also numerous pamphlets published on Dr. Sache verell's case.

which they are founded." As applied to the case at bar and to the American Government, that means: A relatively free government founded upon a revolution is best supported against a relapse into despotism by cherishing the right of revolution even against itself. It also reminds us forcibly that a government having revolution as its origin cannot consistently nor properly suppress advocates of the expediency, timeliness or morality of another revolution.

During the course of the debate the English revolution was defended by Dr. William Talbot, Bishop of Oxford, in these words: "If it be utterly unlawful to resist in any case whatever, even that of a total subversion of the constitution and laws, then there is no distinction of governments, of absolute, I mean, and limited; or if there be a distinction it is a nominal one without any real difference. For what difference is there between princes governing arbitrarily without law, and governing arbitrarily against law? Betwixt having no laws at all and having precarious laws that depend entirely on the will of the prince whether he will observe one of them or subvert them all; and if he does the people cannot help themselves." (p. 499.)

King James, in his speech to Parliament in 1609, said: "A king leaves [ceases] to be a king and degenerates into a tyrant as soon as he leaves off to govern by law; in which case the king's conscience may speak to him as the poor woman to Philip of Macedon, either govern by law or cease to be king."

So then the preaching of the doctrine of absolute non-resistance was adequate to impeach because of a recognition by the House of Lords that the preservation of the right to revolt was essential to maintain even that smaller measure of liberty under the law which was then demanded. On such contentions the impeachment was voted.

THE CASE OF HUGO SPENCER AND SON

Among the precedents cited in support of Dr. Sacherverell's impeachment was the resolution of Parliament in relation to the two Spencers. In the reign of Edward II an act of Parliament was passed to exile Hugo Spencer and his son and thereunder they were banished. In article one of this act it was charged that they had "affirmed and published in writing that homage and oath of allegiance were due more by reason of the crown than by reason of the person of the king, and that if the king did not demean himself according to reason in the exercise of his government, his subjects might remove him, and since that removal could not be by course of law, they might therefore remove him by force."

A subsequent Parliament repealed this act of banishment and the king was deposed by force. This later act of Parliament gives us the highest precedent for the proposition that our several constitutional guarantees were designed to acknowledge the right of ultimate resistance and consequently the right openly and frankly to defend the proposition that at any particular time resistance was or is justifiable and necessary. It was not the purpose of our revolutionary ancestors to penalize mere revolutionary utterances.

Later it will be shown that the idea behind this proposition was that if the right to resistance was freely conceded, then actual resistance would seldom become necessary. Of course, when hostilities are actually begun, then all must take the fate of war, since no abstract principles of liberty or of right will ever restrain the combatants.

THE RIGHT TO CARRY ARMS

Thus far we have examined the significance of the free speech clause in relation to the constitutional definition of treason and have again reached the conclusion that unabridged free speech means the right

to advocate treason (or lesser crimes) so long as no overt criminal act is induced as a direct consequence of its advocacy. We must inquire how far this conclusion is confirmed by the constitutional guarantee to carry arms.

Again the obvious import is to promote a state of preparedness for self-defense even against the invasions of government, because only governments have ever disarmed any considerable class of people as a means toward their enslavement. It remains to ask how this view is supported by the historic conflicts preceding our American Revolution.

Our revolution only extended the principles of freedom of the English revolution of 1688. At that time, to preclude the government from going into rebellion against the people and to check its power, the revolutionists planted themselves firmly upon these propositions: (1) The illegality of raising money for the use of the Crown without grant of Parliament; (2) The illegality of the power claimed by the king to suspend laws or the execution of laws; (3) The illegality of a standing army without consent of Parliament.

Here, as in the case of Magna Charta or our American revolutions, parchment liberties are not long respected unless backed up by an adequate public opinion and physical force. So these restrictions like the others were ignored when in the contest for power this seemed desirable. Let us not forget that it has always been merely a contest for power rather than for principles, though the latter sometimes furnished the pretext behind which the lust for power was bulwarked. Thus it happened that often the precedents and principles of liberty were promoted even by tories.[26]

In the English Bill of Rights dated Feb. 13, 1688, among the grievances charged and to be eliminated

[26] The Revolution of 1688: The Origin of its Principles. The *Monthly Law Magazine*, July 1838, Vol. 2, No. 6, p. 161; Aug. 1838, Vol. 2, No. 7, p. 321; Sept. 1838, Vol. 2, No. 8, p. 477.

was the "keeping a standing army within the kingdom in time of peace without consent of parliament," which supposedly represents the people. Another complaint was that of "causing several good subjects, being protestants, to be disarmed and employed contrary to law."[27] If we are to erect this complaint against disarming part of the people into a general principle, it must be that in order to maintain freedom we must keep alive both the spirit and the means of resistance to government whenever "government is in rebellion against the people," that being a phrase of the time. This of course included the right to advocate the timeliness and right of resistance.

The reformers of that period were more or less consciously aiming toward the destruction of government from over the people in favor of government from out of the people, or as Lincoln put it, "government of, for and by the people." Those who saw this clearest were working towards the democratization of the army by abolishing standing armies and replacing them by an armed populace defending themselves, not being defended and repressed by those in whose name the defence is made.[28]

Upon these precedents, others like them, and upon general principles reformers like DeLolme and John Cartwright made it plain that the right to resist government was one protected by the English Constitu-

[27] Rapin's History of England.

[28] Examine: Andrew Fletcher of Saltoun, A Discourse of Government with Relation to Militia; A Discourse on National and Constitutional Force, (1757); Cartwright's "A Bill of Free and Sure Defence for Constitutional Revival of County Power; Constitutional Maxims; The British Constitution Vindicated, and Indefeasible Hereditary Right, Unlimited Passive Obedience and Non-Resistance Examined by Scripture and History and Proved to be Absurd, etc., etc., Anonymous, London, 1716; Sir William Jones on The Legal Means of Suppressing Riots; Cartwright's Defence of the Constitutional Right to Organize a Revolution will be annexed as a supplement hereto, and in that connection should be read Thomas Jefferson's letter to Cartwright commending the latter's book, and Jefferson's plan for the military forces of Virginia.

tion.[29] DeLolme's book is known to have had great influence with the makers of our constitutions, and Cartwright's argument was endorsed by Thomas Jefferson in a letter to the author.

THE RIGHT TO PETITION

Of course the aristocrats were going to the other extreme in defence of their evil advantage. They made it a crime to argue against hereditary rights even though no direct and specific reflections upon a government were made.[30] This because "everything is criminal which interrupts the established order of society."[31] They argued that "wantonly to defame and indecorously to calumniate the economy, order and constitution of things which make up the general system of law and government of the country" was a crime because this discredited the authority by which they secured for themselves personal advantage. So they said: "No government could support itself if a demagogue could come forward every year and call a meeting to petition government to dissolve itself." Thus spake Lord Holt[32] in justification of the very antithesis of all that the libertarians already quoted contended for. Our American revolution and constitutions decided that conflict in favor of the former doctrine and therefore our constitution provides a guarantee for "the right of the people peaceably to assemble and to petition the government for a redress of grievances." Recent American legislation with the aid of the courts has re-established a worse doctrine than any I have quoted as obtaining formerly in England.[33]

[29] DeLolme, The English Constitution, p. 213, Bohn Edition, 1853; John Cartwright, The English Constitution Produced, pp. 350, 111, 104, Edition of 1823.

[30] Reg. vs. Bedford, 11 State Trials, 121, Gilb. Rep. K.B. 297.

[31] Holt's Law of Libel, p. 42, Edition of 1816, etc.

[32] Holt quoted in Mence on Libel, 167, etc. Holt pp. 81, 85—16th Edition.

[33] People vs. Fox. 127 Pac. Rep. 1111, and generally decisions under anti-anarchist laws, rout, disorderly conduct, etc.

CONSTITUTION AND DECLARATION OF INDEPENDENCE

The blindness and lawlessness of some of our courts suggest an urgent necessity for at least a little more searching of the records for the confirmation of our theory as to the meaning of unabridged freedom of utterance. This brings us to an examination of American records and here I may say that the judicial dogmatism by its blind reversion to the precedents of English tyrants is of no aid except toward a measuring of the judicial intellect.

"The words of the constitution should be given the meaning they were intended to bear when the instrument was framed."[34] Especially in determining the right of revolutionists to express their minds this compels us to look into the sentiments of our revolutionary forefathers for "It is always safe to read the letters of the constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of right which is the foundation of free government."[35]

But the Declaration of Independence affirms that "whenever any form of government becomes destructive of these ends [liberty, justice, etc.,] it is the right of the people to alter or to abolish it," and this was their justification for the forcible resistance which was then used. Construing the right to carry arms and the constitutional definition of treason in the spirit of the Declaration of Independence, we must conclude that these are but attempts to preserve equally the means of resisting with the means of upholding government. Then co-ordinating this conclusion with the meaning of the free speech clause, we conclude that it was designed to maintain an equality of intellectual opportunity between those

[34] Scott vs. Sandford, 19 How. 393; 15 Law. Ed. 52—691.

[35] Gulf E. & St. F. Ry. vs. Ellis, 165 U.S., 160.

who might wish to uphold and those who would overthrow the government.[36]

THE CONTINENTAL CONGRESS ON FREE SPEECH

By reading the century-old arguments in support of this view of free speech, we see that the demand for it was made in the belief that the best way to avoid a revolution was to allow full intellectual freedom for its promotion because this would best warn corrupt officials and induce their reform. So freedom to advocate revolution is the best way to avoid all unnecessary revolution. Such, I believe, was the plainly expressed opinion of the Continental Congress when considering the subject of the freedom of the press. It is worth while to quote again their explicit language as to the purpose of mental freedom.[37]

"The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, *whereby oppressive officials are shamed or intimidated* into more honorable or just modes of conducting affairs."

The same conclusion as to the meaning of freedom of speech is conclusively pointed out by the Virginia legislature and later approved by the Federal Supreme Court. The legislative resolution was drawn by Thomas Jefferson to ensure religious toleration and by defining specifically the limits of religious toleration it furnished general criteria by which to determine the limits of every other kind of toleration.

[36] For the arguments of the time in support of this view of the right, see: James Mill on the Liberty of the Press, also Jeremy Bentham, quoted above.

[37] Address to the Inhabitants of Quebec, Oct. 28, 1774, *Journal of the Continental Congress*, Vol. 1, p. 108, Ed. of 1904.

Here is the language of the resolution: "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency is a dangerous fallacy which at once destroys all liberty because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own. *It is time enough for the rightful purpose of civil government for its officials to interfere when principles break out into overt acts against peace and good order.*"[38]

The celebrated Dr. Benjamin Rush was famous among the signers of the Declaration of Independence, and until his death was treasurer of the United States Mint. In 1787, the same year in which he sat as a member of the convention of Pennsylvania for the adoption of the Federal Constitution, he expressed his views about the establishment of a postal system, in which he furnished an interesting sidelight on freedom of the press as understood by our revolutionary forefathers.

Concerning the Postoffice, these are his words: "For the purpose of diffusing knowledge, as well as extending the living principle of government to every part of the United States—every state, city, county, village and township in the Union should be tied together by means of the postoffice. This is the true non-electric wire of government. It is the only means of *conveying heat and light to every individual in the federal commonwealth.* 'Sweden lost all her liberties,' says the Abbe Raynal, because her citizens were so scattered that they had no means of acting in concert with each other.' It should be a constant injunction to the postmasters, to convey the newspapers free of all charge for postage. They are not only the vehicle of knowledge and intelligence, but

[38] Reynolds vs. U.S., 98 U.S., 163.

the sentinels of the liberties of our country."[39]

JEFFERSON FOR REVOLUTIONISTS

In Reynolds vs. U.S., already quoted, the United States Supreme Court in speaking of intellectual liberty referred to Thomas Jefferson as "the acknowledged leader of the advocates of the measure" for freedom of utterance and "his words are an authoritative declaration of the scope and effect" of the first amendment.

It will be observed that Jefferson's *criteria* as to constitutional freedom of utterance very clearly point to the doctrine that this shall include freedom for the fruitless advocacy of revolution and impliedly all lesser disturbances of peace and good order. It is important, however, that this shall not be left to mere inference from the general language used in the criterion offered. Because the immediate occasion for the language used was religious toleration, it might be argued that Jefferson would perhaps have changed his mind had he contemplated the application of his general language to the subject of rebellion. This then raises a question as to Jefferson's attitude towards revolutions in general and the toleration of their promoters. Fortunately, here we are again able to quote his explicit language which leaves no room for doubt or argument. In a letter to James Madison written in 1787, on the subject of rebellion, Jefferson said: "I hold that a little rebellion now and then is a good thing and as necessary in the political world as a storm is in the physical * * * An observation of this truth should render honest republican governors so mild in their punishment of rebellions as not to discourage them too much. It is a medicine necessary for the sound health of government."[40]

[39] Principles and Acts of the Revolution by Niles, 235.

[40] Ford's Edition of Jefferson's works p. 362-363; see also his letter to Mrs. John (Abigal) Adams, Feb. 22, 1787, vol. 4, p. 370.

That the rebellion here referred to was not a bloodless one appears from Jefferson's letter to Stephen Smith, Nov. 13, 1792.[41]

"Can history produce an instance of rebellion so honorably conducted [referring to Shay's rebellion]? I say nothing of its motives; they were founded in ignorance, not wickedness. God forbid that we should ever be twenty years without such a rebellion * * * What country before ever existed a century and a half without a rebellion, and what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts; pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."

These letters, it must be remembered, were written before the passage of the Alien and Sedition Law. In the campaign of 1799-1800, Jefferson went before the people on the issue of the constitutionality of the Alien and Sedition Law and won a signal victory upon the very issue of his interpretation of freedom of speech. Here then, is the view of the American people as a whole, voting on the very issue of the interpretations of the free speech amendment to the constitution and very soon after the adoption of that amendment. This, Jefferson's pardon of all convicts under that law[42] and the resultant action of Congress in returning the fines which had been paid thereunder, following as that did, the almost contemporary mandate of the people, give for our interpretion of free speech, the highest sanction that any conclusion of constitutional interpretation ever had.

TOWARD THE BROADER SYNTHESIS

Thus the application of the synthetic method of constitutional construction has quite irresistibly led

[41] Vol. 4, p. 467. Ford's edition of Jefferson's works.
[42] See Booth vs. Rycroft, 3 Wisc. Rep., 183.

us to the conclusion that the unabridged freedom of speech guaranteed by our constitution means the right to express with impunity any idea whatever so long as its mere presentation is the only factor involved. If we are seeking criteria of general liberty which could be applied to all cases, we may generalize the conclusion as to freedom in ideas, to freedom as to all conduct not involving actual and material injury and exclude all such from the operations of government. Then we shall have one important factor toward a formula of general liberty.

This partial and tentative conclusion could probably be confirmed by a study of the judicial opinions which uphold liberty by the customary crude empirical inductions. By a succession of these, progressively more inclusive, and by ignoring the dogmatic exceptions to general ideas of liberty by which justices merely evince their tyrannical predispositions, we can arrive at a rational generalization as to the kind of conduct which constitutionally may become the subject of a governmental regulation.

Complete criteria of constitutional liberty must cover criteria as to (1) the source of the regulation; (2) the formalities of its enactment and promulgation; (3) the acts properly subjected to regulation; (4) the qualities of the regulation itself. So far as I am informed the first two of these do not involve specially difficult problems, but this may be due to the fact that I have not sufficiently studied these phases of the problem.

We have already considered somewhat the essentials of constitutionality of means by which liberty may be curtailed as to subject matter legitimately within the province of regulation. These also can be generalized and form another important factor in the criteria of freedom. Thus we arrive at the requirements of generality of application, certainty of meaning and equality of all the individuals similarly situated.

Another element of freedom is the personal one as

to which not much controversey arises. This involves the relation of the individual to the state, and excludes from the usual rule all those who are imbeciles, insane, immature and those who, having capacity, give their consent without fraud being practiced upon them and consciously assume the risk of particular conduct.

I cannot take the space to reproduce all these processes but must rely upon the intelligence of the reader to extend the methods already indicated and thereby to check my statements of the result. Thus successively we combine general statements to give us criteria of liberty as a whole. I will conclude here by offering tentatively such a general statement as to constitutional liberty as our courts have said cannot be made. This may need amplification, especially as to matters upon which there is the least controversy.

Under the constitution social liberty means state protection in a conceded claim of right to freedom from all artificial interference or human penalty in the pursuit of any course of action, except that which in its necessary and most immediate result inflicts actual and material injury upon someone other than a sane, normal adult, participant therein or consentant thereto and consciously assuming the risk thereof; or upon one whose consent was induced by fraud or the coercive influence of human artifice. As a means to this end the legislature may protectively regulate the imminent danger of actual and material injury but this must be done only in such a way as not to prevent or impair any single social or personal use of that which is dangerous—and the dangerousness must be determined in each instance only by known physical laws. Moreover, social regulations must emanate from those specifically authorized to make them, and must be enacted and promulgated in the manner prescribed by the fundamental law. Besides, in content the regulations must be general in form, certain in meaning, of prior publi-

cation and necessarily equal in their applicability to all persons in the same relations to one another and holding the same natural relation to the government; and finally such protective regulations must be manifestly the most appropriate means for promoting the authorized end.

Before the fourteenth amendment, it was held that previous amendments imposed restrictions only upon federal authority. Then the fourteenth amendment to the federal constitution withdrew even from the states all authority to deprive anyone of "liberty" without "due process of law." The question now is, what "liberty" is thus protected against even state-abridgment? Obviously the constitution is the most important source of expressed information as to what is meant by constitutional liberty. Necessarily then, in the fourteenth amendment "liberty" can mean only those fundamental liberties (and must have been intended to include them all) which by previous amendments had been deemed sufficiently important to be expressly withdrawn from federal, authority,[43] (not forgetting the fifth which already embodied the same general language). But the liberties guaranteed by earlier amendments to the federal constitution are those which were synthetized in the hereinbefore stated general criteria of constitutional liberty. It therefore follows that by virtue of the fourteenth amendment the above stated criteria of constitutional liberty are controlling even as to the conflict of state legislation with the federal constitution.

The judicial mind often does not work essentially different from the mind of a child. In consequence of this judges are quite often unable to distinguish between what the constitution does say and what the judge thinks it ought to say. Since it never has been a judicial habit to promote liberty, there is no likeli-

[43] See, State vs. Loomis, 115 Mo. Rep. 307; 22 So. W. Rep. 350-351; 21 L.R.A. 789.

hood that these criteria of constitutional liberty will be either generally or immediately incorporated into the judicial decisions.

It is doubtless true that no such generalization can be made which will fit into all whimsical predispositions or satisfy the lust for power of our judges and legislators. These will be ignored by sensible men who, for correction, will not refer the foregoing paragraph to their "inner consciousness," but will apply only the scientific method. From such persons criticism will be helpful and welcome and probably will result in discovering some necessary amendment to the formula suggested.

It should be added that the above statement as to the dividing line between liberty and the tyranny of the police power is not conceived as an ultimate and final statement of the limits of liberty as these might obtain among people of highly cultivated social consciousness. Our liberties will always be in the making and some future society will doubtless conceive a different social organism wherein different essentials of liberty will prevail. The formula hereinabove offered is designed only to cover the highest conception of liberty to be derived by the scientific method from our constitution and an ideal that we should work toward and may hope to realize in practice under our present governmental machinery.

FOREWORD TO APPENDIXES

The purpose of all free speech propaganda is to increase intellectual hospitality to the end that more truth may prevail. To preach generally the duty or advantage of tolerance is seldom effective because very few persons have intellectual capacity for the adequate grasp of advantages so remote as are those belonging to the love of truth in the abstract or of general ideas and a still smaller number have the inclination and courage to give to general principles a consistent deductive application.

Just as we compel children to attend school, so one may be tempted to use force in compelling people to listen to some unpopular doctrine, as the only way to show them that no idea is so preposterous as to merit suppression, or so dangerous as is generally believed. As an improvement on such compulsory education of the adults with immature minds, I would persuade them to read and try to understand a few of the most revolutionary books in each of those fields of thought where taboo and anathema are most in evidence.

In this pamphlet we are concerned only with legalolitry and the political and economic heretics whom it suppressed. In the following appendices are reproduced some discussions which are quite inaccessible to American readers and which have a direct bearing upon the constitutional problems discussed and the conclusions reached in the foregoing essay.

Those who care to understand the mental attitude of intelligent disbelievers in the worship of law and order should read a little of the more famous literature of revolt. Here I recommend: "Existing Circumstances the Watchword of Despotism"; Colonel Sexby's, "Killing no Murder"; Edmund Burke's, "Vindication of Natural Society"; Sir James Mack-

intosh's, "Defense of the French Revolution"; Henry D. Thoreau's, "Duty of Civil Disobedience"; Elisee Reclus', "Evolution and Revolution"; Prince Kropotkin's, "Law and Authority"; Robert Spence Watson's, "Proper Limits of Obedience to Law"; Herbert Spencer's, "Right to Ignore the State"; Henry W. Nevinson's, "Rebellion"; and Brand Whitlock's, "On The Enforcement of Law in Cities."

At present the beneficiaries of vested wrongs and legalized injustice are cultivating a species of patriotic lilliputian who in the press, from the pulpit and the judicial bench compels the repudiation of all the radical principles on which this government was founded. Those who wish to see the contrast between the principles of real patriots and the patriots of principal should contrast the utterances of some of the founders of this government with those relatively mild and conservative utterances for which men are now being sent to jail. It is only by such comparison that one can adequately appreciate how far America has been Russianized.

Even men like General Burgoyne could see the likeness between the divine right of kings and the present superstitious apotheosis of a majority. General Burgoyne in a letter to General Lee said: "I am ready to acknowledge that the same resistance applies as forcibly against the abuses of the collective body of power as against those of the crown or either of the component branches separately."[1]

In an answer of the House of Representatives of Massachusettes to Gov. T. Hutchinson and dated March 2, 1773, this is said: "It is consent alone that makes any human laws binding; and, as a learned author observes, a purely voluntary submission to an act, because it is highly in our favor and for our benefit, is in all equity and justice, to be deemed as not at all proceeding from the right we include in

[1] Principles and Acts of the Revolution, p. 121.

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the legislators, that they thereby obtain an authority over us, and that ever hereafter, we must obey them of duty."[2]

Such legislators would now be called anarchists and undesirable citizens. Dr. Benjamin Church in an oration delivered at Boston, March 5, 1773, said: "The constitution of a magistrate does not, therefore, take away that lawful defence against force and injury, allowed by the law of nature*—* As a despotic government is evidently productive of the most shocking calamities, whatever tends to restrain such inordinate power, though in itself a severe evil, is extremely beneficial to society; for where a degrading servitude is the detestable alternative, who can shudder at the reluctant poignard of a Brutus, the crimsoned axe of a Cromwell, or the reeking dagger of a Ravillac."[3] That of course conflicts violently with our modern well-trained slavishness, but not the sentiment of our revolutionary fathers.

Benjamin Hichborn, Esq., in an oration delivered at Boston, March 5, 1777, said: "The right that every individual has to reason freely upon the nature of that government he is called to submit to, having nature for its source, is no less obvious and perceptible—and hence, *as a necessary foundation for the exercise of this right,* I define civil liberty to be, not 'a government by laws,' made agreeable to charters, bills of rights or compacts, but a power existing in the people at large, at any time, for any cause, *or for no cause,* but their own sovereign pleasure, to *alter or annihilate* both the mode and essence of any former government, and adopt a new one in its stead."[4]

On the necessity of keeping alive the power of successful resistance, William Tudor in an oration delivered at Boston, March 5, 1779, said this: "Every day new inroads are made upon public

[2] Principles and Acts of the Revolution, p. 93.

[3] Principles and Acts of the Revolution, pp. 34-35.

[4] Principles and Acts of the Revolution, p. 47.

liberty, while encroachments, like temptations, grow more frequent and more dangerous in proportion as the power of resistance decreases."[5] Perhaps that is why our modern masters are so cunningly and successfully destroying the power of resistance that they even punish those who talk about it. I am simply trying to persuade the masters and their blind followers that even from their own point of view they would better let the radicals talk as the best means of preventing radical action, but of course they won't see it. So then the only result of my preachments is the preacher's joy of preaching.

THEODORE SCHROEDER.

[5] Principles and Acts of the Revolution, p. 57.

JAMES MILL

James Mill (1775-1836) had the misfortune to be the parent of John Stuart Mill, whose greater fame has almost eclipsed the father's reputation as economist and philosopher. Bentham said: "I was the spiritual father of [James] Mill, and Mill the spiritual father of Ricardo. It was by Mill's encouragement that Ricardo was induced to publish 'Political Economy' and to enter Parliament." Lewes records to James Mill's credit, also this: "The first person who saw his [Hobbs'] importance as a political thinker and had the courage to proclaim it was, I believe, James Mill." Upon its appearance, in 1818, his "History of India" at once put Mill in the first rank among the authors of his time. This is a "standard work" upon that subject. After this Mill became a political reformer. He was the warmest disciple of Jeremy Bentham, as well as his close friend, neighbor and all but constant companion. When old age disqualified Bentham from active management of the reform campaign to which he had given such conspicuous impetus, James Mill became the recognized leader of the Benthamite party. Among his warm friends he numbered such men as Lords Brougham and Langdale, also George Grote, John and Charles Austin, William Ellis, Walter Coulson and John Black. During the crisis of the Reform Bill, Mill was much sought and consulted.

He was instrumental in starting the *Edinburgh Review,* and frequently wrote for its pages. He also contributed articles to the *Encyclopaedia Britannica.* One of these on "Government" forcefully and concisely stated the progressive creed of the time, according to Benthamite principles. This became a "text-book for the young men of the Union at Cam-

bridge," and was deemed worthy of a reply from Macauley.

Another of these essays written for the *Encyclopaedia* was upon "The Liberty of the Press." From that article the following pages are extracted. As we read their unanswered logic, and remember that Mill was conservative enough to be a Monarchist, we are made to feel that our American progressives and reformers must belong to the "libertarians" of the tenth century.

T. S.

ON LIBERTY OF THE PRESS

FOR ADVOCATING RESISTANCE TO GOVERNMENT

BY JAMES MILL

(Extracts from an article in the supplement to the Sixth Edition of the *Encyclopaedia Britannica*, *1821*)

EXHORTATIONS TO RESIST ALL POWERS OF GOVERNMENT AT ONCE, SHOULD NOT BE CONSIDERED OFFENSES. Unless a door is left open to resistance of government, in the largest sense of the word, the doctrine of passive obedience is adopted; and the consequence is, the universal prevalence of misgovernment ensnaring the misery and degradation of the people. On the other hand, unless the operations of government, instituted for the protection of rights, are secured from obstruction the security of rights, and all the advantages dependent upon the existence of government, are at an end. Between these two securities, both necessary to obtain the benefits of good government, there appears to be such a contrariety that the one can only be obtained by the sacrifice of the other. * * *

The application of physical force which is treated as an evil is clearly distinguishable from that resistance of government which is the last security of the many against the misconduct of the few. * * It is resistance to all the powers of government at

once, either to withdraw them from the hands in which they have hitherto been deposited, or greatly to modify the terms upon which they are held. * *

We think it may be satisfactorily shown, that no operation of the press, however directly exhorting to this species of resistance ought to be treated as an offense.

The reason is, that no such exhortation can have any immediate or formidable effect; can indeed, have *any* effect at all, except through such a medium as ought to be, at all times perfectly free. Suppose that a work is published, exhorting the people in general to take arms against the government, for the purpose of altering it against the consent of its rulers. The people cannot take arms against the Government without the certainty of being immediately crushed, unless there has been already created a general consent. If this consent exists in such perfection as to want nothing to begin action but an exhortation, nothing can prevent the exhortation, and forbidding it is useless. If the consent does not exist in nearly the last degree of perfection, a mere exhortation, read in print, can have no effect which is worth regarding. In all circumstances, therefore it is useless and consequently absurd, to treat this species of exhortation as an offense. If on the other hand it were clearly recognized, that every man had a license to exhort the people to a general resistance of government, all such exhortations would become ridiculous, unless on those rare and extreme occasions on which no prohibitions, and no penalties can or ought to prevent them. * *

We think it will appear, with sufficient evidence, that in the way of indirect exhortations to resistance that is, in laying the grounds of dissatisfaction with the government, there is no medium between allowing everything, and allowing nothing; that the end, in short, which is sought to be gained, by allowing anything to be published in censure of the government,

cannot be obtained, without leaving it perfectly free to publish everything.

The end which is sought to be obtained, by allowing any thing to be said in censure of the government, is, to ensure the goodness of the government; the most important of all the objects, to the attainment of which, the wisdom of man can be applied. If the goodness of government could be ensured by any preferable means, it is evident that all censure of the government ought to be prohibited. All discontent with the government is only good, in so far as it is a means of removing *real cause* of discontent. If there is no cause, or if there is better means of removing the cause, the discontent is, of course, an evil and that which produces it an evil.

So true it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent, is, in all civilized countries, among all but the advocates of misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.

For what is meant by a vicious government? or wherein do the defects of government consist? Most assuredly they all consist in sacrificing the interests of the many to the interests of the few. The small number, in whose hands the powers of government are, in part directly, in part indirectly, placed, cannot fail, like other men, to have a greater regard for what is advantageous to themselves, than what is advantageous to other men. They pursue, therefore, their own advantage, in preference to that of the rest of the community. That is enough. Where there is nothing to check that propensity, all the evils of misgovernment, that is, in one word, the worst evils by which human nature is afflicted, are the inevitable consequence. (See the article GOVERNMENT.)

There can be no adequate check without the freedom of the press. The evidence of this is irresistible. In all countries, the people either have a power legally and peaceably of removing their governors, or they have not that power. If they have not that power, they can only obtain very considerable ameliorations of their governments by resistance, by applying physical force to their rulers, or, at least, by threats so likely to be followed by performance, as may frighten their rulers into compliance. But resistance, to have this effect, must be general. To be general, it must spring from a general conformity of opinion, and a general knowledge of that conformity. How is this effect to be produced, but by some means, fully enjoyed by the people, of communicating their sentiments to one another? Unless where the people can all meet in general assembly, there is no other means, known to the world, of attaining this object, to be compared with the freedom of the press.

It is, no doubt, true, that in countries where the liberty of the press is unknown, evil governments are frequently overthrown. This is almost always accomplished by the military force, revenging some grievance of their own, or falling in with some heat and animosity of the people. But does it ever enable them to make a new government, in which any greater security is provided for their interests than there was before? In such cases, the people get rid of one set of rulers, whom they hate, only to obtain another set, with equal powers of doing them injury.

There are, however, we believe, some people who say, that though the liberty of the press is a necessary instrument to attain good government, yet, if it is fairly attained, and if legal and peaceable means are in the hands of the people of removing their governors for misconduct;—if the people of England, for example, really chose the members of the House of Commons, and renewed their choice so frequently,

as to have the power of removal after a short experience of misconduct, the freedom of the press would be unnecessary.

So far is this from being true, that it is doubtful whether a power in the people of choosing their own rulers, without the liberty of the press, would be an advantage.

Freedom of Censure on the Conduct of their Rulers, is necessary for the good of the People

It is perfectly clear, that all chance of advantage to the people, from having the choice of their rulers, depends upon their making a good choice. If they make a bad choice—if they elect people either incapable, or disinclined, to use well the power entrusted to them, they incur the same evils to which they are doomed when they are deprived of the due control over those by whom their affairs are administered.

We may then ask, if there are any possible means by which the people can make a good choice, besides the *liberty of the press?* The very foundation of a good choice is knowledge. The fuller and more perfect the knowledge, the better the chance, where all sinister interest is absent, of a good choice. How can the people receive the most perfect knowledge relative to the characters of those who present themselves to their choice, but by information conveyed freely, and without reserve, from one to another?

There is another use of the freedom of the press, no less deserving the most profound attention, that of making known the conduct of the individuals who have been chosen. This latter service is of so much importance, that upon it the whole value of the former depends.

This is capable of being rigidly demonstrated. No benefit is obtained by making choice of a man who is well qualified to serve the people, and also well inclined to serve them, if you place him in a situation in which he will have preponderant motives to serve himself at their expence.

If any set of men are chosen to wield the powers of government, while the people have not the means of knowing in what manner they discharge their duties, they will have the means of serving themselves at the expence of the people; and all the miseries of evil government are the certain consequence.

Suppose the people to choose the members of the Legislative Assembly, with power of rechoosing, or dismissing them, at short intervals: To what desirable end could these powers be exercised, without the liberty of the press? Suppose that any one of those whom they have chosen has misconducted himself, or promoted, as far as depended upon him, the ends of misgovernment; how are the people to know that the powers with which they had entrusted him had been treacherously employed?

If they do not know, they will rechoose him, and that as cordially as the man who has served them with the greatest fidelity. This they are under a deplorable necessity of doing, even to be just; for, as they know no difference between him and the best, it would be on their part iniquity to make any. The consequences would be fatal. If one man saw that he might promote misrule for his own advantage, so would another; so, of course, would they all. In these circumstances, we see laid the foundation on which, in every country, bad government is reared. On this foundation it is impossible that it should not be reared. When the causes are the same, who can expect that the effects will be different? It is unnecessary to dwell upon these fundamental truths, because they have already been developed in the article GOVERNMENT.

Without the knowledge, then, of what is done by their representatives, in the use of the powers entrusted to them, the people cannot profit by the power of choosing them, and the advantages of good government are unattainable. It will not surely cost many words to satisfy all classes of readers

that, without the free and unrestrained use of the press, the requisite knowledge cannot be obtained.

That an accurate report of what is done by each of the representatives, a transcript of his speeches, and a statement of his propositions and votes, is necessary to be laid before the people, to enable them to judge of his conduct, nobody, we presume, will deny. This requires the use of the cheapest means of communication, and, we add, the free use of those means. Unless every man has the liberty of publishing the proceedings of the Legislative Assembly, the people can have no security that they are fairly published. If it is in the power of their rulers to permit one person, and forbid another, the people may be sure that a false report,—a report calculated to make them believe that they are well governed when they are ill governed, will be often presented to them.

One thing more is necessary, and so necessary, that, if it is wanting, the other might as well be wanting also. The publication of the proceedings tells what is done. This, however, is useless, unless a correct judgment is passed upon what is done.

We have brought this inquiry, then, to an important point. In the article GOVERNMENT, we have seen that, unless the people hold in their own hands an effectual power of control on the acts of their government, the government will be inevitably vicious: We have now seen, that they cannot exercise this control to any beneficial purpose without the means of forming a correct judgment upon the conduct of their representatives: We have likewise seen, that one of the means necessary to enable them to judge correctly of the conduct of their representatives, is the liberty to every body of publishing reports of what they do. It remains to inquire, by what other acts the press can be made to contribute to the same desirable end.

What is wanted is, that all the people, or as many

of them as possible, should estimate correctly the consequences of the acts proposed or done by their representatives, and also that they should know what acts might have been proposed, if the best were not proposed, from which better consequences would have followed. This end would be accomplished most effectually, if those who are sufficiently enlightened would point out to those who are in danger of mistakes, the true conclusions; and showing the weight of evidence to be in their favour, should obtain for them the universal assent.

How is this to be accomplished? In what manner are those wise men to be chosen? And who are to be the choosers? Directly the object cannot be attained. There are no distinct and indubitable marks by which wisdom, and less by which integrity, is to be known. And who is to be trusted with the privilege of pointing them out? They whose judgment requires to be directed are not well qualified to determine who shall direct them. And if the rulers are to choose, they will employ none but those who will act in conformity to their views, and enable them to benefit themselves by the pillage and oppression of the people.

As there is no possible organ of choice, no choice whatever ought to be made. If no choice is to be made, every man that pleases ought to be allowed. All this is indubitable. The consequences of denying any part of it are so obvious, that hardly any man, we suppose, will risk the imputations to which such a denial would justly expose him.

They who say that no choice ought to be made, say, in effect, that no limit whatsoever ought to be imposed upon the liberty of the press. The one of these propositions is involved in the other. To impose any restraint upon the liberty of the press, is undoubtedly to make a choice. If the restraint is imposed by the government, it is the government that chooses the directors of the public mind. If

any government chooses the directors of the public mind, that government is despotic.

Suppose that, by the restraint imposed upon the liberty of the press, all censure of the government is forbidden, here is undoubtedly a choice. The government, in this case, virtually says, The people who might attempt the task of directing the public mind are of two sorts; one that of those who would censure; another that of those who would not censure; I choose the latter.

Suppose that not every censure, but only such and such kinds of censure, are forbidden; here, again, is still a choice, while confessedly there is no party to whom the power of choosing for the rest can with safety be given.

If not every censure, but only some censures, are to be forbidden, what are those to which the prohibition should extend? The answer to this question will elucidate nearly all that yet remains in any degree obscure, of the doctrine of the liberty of the press.

It will not be said that any censure which is just should be forbidden; because that would undoubtedly be to detract from the means of enabling the people to form correct judgments; and we have, we trust, rendered it indisputable that no source of benefit to society is at all to be compared with that of correct judgments, on their government and its functionaries, formed by the people, and determining their actions.

But what censures are just and what are unjust; in other words, what are the conclusions which ought to be formed respecting the properties and the acts of the government, is exactly the point to be determined. If you say that no man is to pass an unjust censure upon the government, who is to judge? It is surely unnecessary to repeat the proof of the proposition, that there is nobody who can safely be permitted to judge. The path of practical wisdom

is as clear as day: All censures must be permitted, equally; just, and unjust.

Where various conclusions are formed among a number of men, upon a subject on which it would be unsafe, and therefore improper, to give any minor portion of them a power of determining for the rest, only one expedient remains. Fortunately, that is an expedient, the operation of which is powerful, and its effects beneficial in the highest degree. All the conclusions which have formed themselves in the minds of different individuals, should be openly adduced; and the power of comparison and choice should be granted to all. Where there is no motive to attach a man to error, it is natural to him to embrace the truth; especially if pains are taken to adapt the explanation to his capacity. Every man, possessed of reason, is accustomed to weigh evidence, and to be guided and determined by its preponderance. When various conclusions are, with their evidence, presented with equal care and with equal skill, there is a moral certainty, though some few may be misguided, that the greater number will judge aright, and that the greatest force of evidence, wherever it is, will produce the greatest impression.

As this is a proposition upon which every thing depends, it is happy that the evidence of it should be so very clear and striking. There is, indeed, hardly any law of human nature more generally recognized, wherever there is not a motive to deny its existence. "To the position of Tully, that if Virtue could be seen, she must be loved, may be added," says Dr. Johnson, "that if Truth could be heard, she must be obeyed." *(Rambler,* No. 87*)*—"Je vous plains, mes Pères," says Mons. Pascal to the Jesuits, "d'avoir recours à de tels remèdes. Vous croyez avoir la force et l'impunité: mais je crois avoir la verité, et l'innocence. C'est une etrange et longue guerre que celle ou la violence essaie d'opprimer la verité. Tous les efforts de la violence ne peuvent affoiblir la verité,

et ne servent qu'à la relever davantage: toutes les lumières de la verité ne peuvent rien pour arrêter la violence, et ne font que l'irriter encore plus. Quand la force combat la force, la plus puissante detruit la moindre: quand l'on expose les discours aux discours, ceux qui sont veritables et convainquants confondent et dissipent ceux qui n'ont que la vanité et le mensonge." (*Lett. Provinc.* 12.)—"Reason," says Burke, "clearly and manfully delivered, has in itself a mighty force; but reason, in the mouth of legal authority, is, one may fairly say, irresistible." *(Lett. on Regicide Peace.)*

It is of importance to show how many of the greatest men, of all ages and countries, have borne testimony to the prevalence of true over false conclusions, when both are fairly offered to the human mind. "Truth," says Mr. Locke, "certainly would do well enough, if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known, and more rarely welcome. She is not taught by law nor has she any need of force to procure her entrance into the minds of men." *(Letter on Toleration.)* The following is the emphatical language of Montesquieu: "La raison a un empire naturel; elle a même un empire tyrannique: on lui resiste, mais cette resistance est son triomphe, encore un peu de temps, et l'on sera forcé de revenir à elle." (*Esp. de Loix,* l. 28, ch. 38. —"It is noted out of Cicero, by Machiavel, that the people, though they are not so prone to find out truth of themselves, as to follow custom, or run into error; yet if they be shown truth, they not only acknowledge and embrace it very suddenly, but are the most constant and faithful guardians and conservators of it." *(Harrington.)*—"The labour of a confutation," says Chillingworth, "I have not in any place found such labour or difficulty, but that it was undertakeable by a man of very mean abilities; and the

reason is, because it is *Truth* I plead for; which is so strong an argument for itself, that it needs only light to discover it." *(Religion of Protestants.)*—"About things on which the public thinks long," says Dr. Johnson, "it commonly attains to think right" (*Life of Addison.)*—"The adversary," says Dr. Campbell, "is both subtile and powerful. With such an adversary, I should on very unequal terms enter the lists, had I not the advantage of being on the side of truth. And an eminent advantage this doubtless is. It requires but moderate abilities to speak in defence of a good cause. A good cause demands but a distinct exposition, and a fair hearing; and we may say, with great propriety, it will speak for itself." (Campbell *on Miracles,* Introd.)

We have then arrived at the following important conclusions,—that there is no safety to the people in allowing anybody to choose opinions for them; that there are no marks by which it can be decided beforehand, what opinions are true and what are false; that there must, therefore, be equal freedom of declaring all opinions, both true and false; and that, when all opinions, true and false, are equally declared, the assent of the greater number, when their interests are not opposed to them, may always be expected to be given to the true. These principles, the foundation of which appears to be impregnable, suffice for the speedy determination of every practical question.

All censure thrown upon the government, all censure thrown either upon the institutions of the government, or upon the conduct of any of the functionaries of government, supreme or subordinate, has a tendency to produce resistance to the government.

Of the censures thrown upon government, some may have a tendency to produce resistance to the operations of government in detail; others that gen-

eral resistance which has in view some great alteration in the government.

Of the first sort would be any such accusation of the conduct and disposition of a judge, as might excite the people, whose sympathies were roused in favour of the individual against whom his sentence was to operate, to rescue him from the officers of justice. We have already shown that such a rescue ought to be punished, and any direct exhortation to it ought to be punished. It will now be evident, we trust, that no censure on the judge, though capable of being treated as an indirect exhortation, ought to be punished.

The reason is conclusive. The people ought to know, if possible, the real qualities of the actions of those who are entrusted with any share in the management of their affairs. This they have no chance of knowing, without the unlimited power of censure upon those actions, both in gross and detail. To see the full force of these propositions, it is only necessary to apply the principles which have been already established.

If the people have not the means of knowing the actions of all public functionaries, they have no security for the good conduct even of their representatives. Suppose it is the duty of their representatives to watch the conduct of the judges, and secure the perfection of judicature, the people cannot know whether their representatives perform this duty, unless they know what the conduct of the judges is. Ignorance of this would of itself suffice to vitiate the government. A door would be left open, through which the rulers might benefit themselves at the expence of the people. All the profit to be made by an abuse of the power of justice, would thus become the profit of the representatives, by whom it would be allowed, and encouraged, as far as the knowledge which they could not withhold from the people, would permit.

That the people ought, therefore, to know the conduct of their judges, and when we say judges we mean every other functionary, and the more perfectly the better, may be laid down as indubitable. They are deprived of all trustworthy means of knowing, if any limit whatsoever is placed to the power of censure.

All censure consists in the delivery of an unfavorable opinion, with or without the grounds of it. This is the essence of censure. But if the conduct of the judge deserves that an unfavorable opinion should be entertained of it, the more perfectly that is known to the people, the better.

The conduct of the judge, on this occasion, says a defender, does not deserve an unfavourable opinion: A public expression of such an opinion ought, therefore, to be prohibited. But there are occasions on which the conduct of judges deserves an unfavourable opinion. When it is deserved, there is no security for good government, unless it is allowed to be made known. How can you allow an unfavourable opinion to be delivered in the one case, and not delivered in the other? To have the benefit of it in the one case, you must submit to the evil of it in the other.

In matters of Government, undeserved Praise as mischievous as undeserved Blame.

As the real point of importance is, to establish correct opinions in the minds of the people, it is as mischievous to inculcate a favourable opinion, when an unfavourable is deserved, as an unfavourable when a favourable is deserved; and, in the eye of reason, it is incontrovertible, that, if the one deserves to be prevented by punishment, so does the other.

But, if an unfavourable opinion is pronounced of any public functionary; of a judge, for example, would you have it left uncontradicted? Would you

not grant the liberty of calling in question the truth of the allegations, and of supporting a different opinion? If not, the character of no public functionary would be safe, and any man, however deserving, might be made to appear the proper object of the most unfavourable sentiments. Why should not the two cases be treated equally? Why should not the favourable, as well as the unfavourable opinion be open to contradiction?

It is perfectly certain, that it is not in the power of law to mark out, by antecedent definition, any sort of men, of whom it can say, all opinions favourable to such men shall be punished. It can never be affirmed of any men beforehand that they will certainly perform such and such injurious actions. If they do perform them, all declarations conformable with the matter of fact are good. But the question is, whether they have performed them? One man, affirms that they have. Is that to be taken for granted? And is no man to be allowed to affirm the contrary, and to sift the grounds upon which the allegations of the other man are supported? It is by weighing well the evidence on both sides, that a well-founded opinion is capable of being formed. And it is certain, that the best security for having the evidence on both sides fully adduced, and the strength and weakness of it perfectly disclosed, is by permitting all those who are attached to different opinions to do what they can for the support of them.

If it is evident that it ought not to be permitted to speak evil of public functionaries without limit, while any limit is put to the power of speaking well of them; it is equally evident that, for the purpose of forming a correct opinion of their conduct, it ought not to be permitted to speak well of them, and oppose any limit whatsoever to the power of speaking ill of them.

It ought not to be permitted to speak evil of

them without an equal liberty of speaking well; because, in that case, the evidence against them might be made to appear much stronger than it was. It ought not to be permitted to speak well of them without an equal liberty of speaking ill; because, in that case, the evidence in favour of them might be made to appear much greater than it really was. In either case, the people would be misguided, and defrauded of that moral knowledge of the conduct of their rulers, the paramount importance of which has so fully appeared.

It may be said (as by the short-sighted, if we did not anticipate them, it would be said), that if, by limiting the power of censure, the people are made to judge more favourably of their rulers than they deserve, the evil is small; but if they are permitted to form a very unfavourable opinion, the consequences are alarming.

We believe it may be rigidly demonstrated, that no evils are greater than those which result from a more favourable opinion of their rulers, on the part of the people, than their rulers deserve; because just as far as that undue favour extends, bad government is secured. By an opinion of their rulers more favourable than they deserve, is implied an ignorance on the part of the people of certain acts of their rulers by which the people suffer. All acts by which the rulers have any motive to make the people suffer, are acts by which the rulers profit. When the ignorance of the people extends to material points, all the evils of bad government are secured. These are the greatest of all possible evils. To this it will not be said that the ignorance of the people ought to extend. On all material points, it is admitted, then, that the freedom of censure ought to be complete. But if it is to be allowed on great points, on those where it is calculated to excite the greatest disapprobation; what can be thought of their consistency, who would restrain it on those

where it is only calculated to excite a small? If it is proper to protect the people from great injuries at the hands of their rulers, by exciting a *strong,* it is good to protect them against small injuries, by exciting a *weak* disapprobation.

To public functionaries may be imputed either acts which they have not performed, or a want of certain qualifications, moral or intellectual, which they possess.

With respect to acts, and even dispositions, which do not, either directly or indirectly, concern their public function, the same protection may be safely extended to them as to private men.

Acts in their public capacity which they have not performed, may be imputed to them either by mere forgery, and without any appearance of ground, or they may be imputed with some appearance of ground. From permitting the former, no good can be derived. They ought, therefore, to be prevented, in the same way as false imputations, injurious to individuals in their private capacity. That there should be no restraint in imputing actions to any public functionary which he may appear to have done, flows immediately from the principles already established, and requires not that any thing should here be added to its proof. Any appearance sufficient to lay the foundation of the slightest suspicion, renders it useful to call the attention of the public to the suspected part, which can only be done by making the suspicion known. A man may indeed, publish, as a matter of fact, what is supported by appearances which would only justify the slightest suspicion. In that case, he is sure of incurring the disgrace of temerity, if not of malignity; and this is all the penalty which needs or can safely be inflicted upon him.

In imputing inaptitude to a public functionary, on the score either of intellectual or moral qualities, scarcely any limitation would be safe. Every man

ought to have liberty to declare upon this subject any opinion which he pleases, and support it by any evidence which he may think adapted to the end. If, in supporting his opinion of the inaptitude of any public functionary, he imputes to him actions which there is not even an appearance of his having performed, that limited prohibition, the propriety of which we have just recognized, will strictly apply. With this exception, freedom should be unimpaired.

We have now, therefore, explained, we hope sufficiently, in what manner the principles which we have established require, that the use of the press should be regulated in speaking of the *action* of functionaries, and of their fitness for the duties which they are appointed to discharge, whether those functionaries are the immediate representatives of the people, or others whom it is the business of those representatives to control.

Freedom of Censure on the Institutions of Government is necessary for the good of the People.

We have next to inquire in what manner those principles require that the use of the press should be regulated in speaking of the *institutions* of government. The illustrations already adduced will supersede the use of many words upon this part of the subject.

Institutions of government are good in proportion as they save the people from evil, whether it be evil created by the government, or evil not prevented by the government. Institutions of government are bad in proportion as they are the cause of evil to the people, either by what they create, or what they fail in preventing.

According to this statement, which it is impossible to controvert, institutions of government may, in strict propriety of speech, be said to be the cause of all the evil which they do not save the people from, and from which the people would be saved by any other institutions.

It is therefore of the highest importance that the people should know what are the institutions which save from the greatest quantity of evil, and how much their own institutions want of being those best institutions.

Institutions of government are bad, either because those in whose hands the powers of government are placed do not know that they are bad, and though willing, cannot improve them; or they are bad, because those who have in their hands the powers of government do not wish that they should be improved.

Where the rulers are willing, but do not know how to improve the institutions of government; everything which leads to a knowledge of their defects is desirable to both rulers and people. That which most certainly leads to such knowledge is, that every man who thinks he understands any thing of the subject, should produce his opinions, with the evidence on which they are supported, and that every man who disapproves of these opinions should state his objections. All the knowledge which all the individuals in the society possess upon the subject is thus brought, as it were, to a common stock or treasury; while every thing which has the appearance of being knowledge, but is only a counterfeit of knowledge, is assayed and rejected. Every subject has the best chance of becoming thoroughly understood, when, by the delivery of all opinions, it is presented in all points of view, when all the evidence upon both sides is brought forward, and all those who are most interested in showing the weakness of what is weak in it, and the strength of what is strong, are, by the freedom of the press, permitted, and by the warmth of discussion excited, to devote to it the keenest application of their faculties. False opinions will then be delivered. True; but when are we most secure against the influence of false opinions? Most assuredly when the grounds

of these opinions are the most thoroughly searched. When are the grounds of opinion most thoroughly searched? When discussion upon the subject is the most general and the most intense; when the greatest number of qualified persons engage in the discussion, and are excited by all the warmth of competition, and all the interest of important consequences, to study the subject with the deepest attention. To give a body of rulers, or any other body of men, a power of choosing, for the rest, opinions upon government, without discussion, we have already seen, upon good evidence, is the way to secure the prevalence of the most destructive errors.

When institutions are bad, and the rulers would gladly change them if they knew they were bad, discussion, it will not be disputed, would be good for both parties, both rulers and ruled. There is, however, another case, and that by far the most common, where the rulers are attached to the bad institutions, and are disposed to do all in their power to prevent any alteration. This is the case with all institutions which leave it in the power of the men who are entrusted with the powers of government, to make use of them for their own advantage, to the detriment of the people; in other words, which enable them to do injury to the people, or prevent the people from good. This is the case with by far the greater number of those institutions by which the people suffer. They are institutions contrived for benefiting the few at the cost of the many.

With respect, therefore, to the greater number of defective institutions, it is the interest of the rulers that true opinions should not prevail. But with respect to these institutions, it is of still greater importance to the people that discussion should be free. Such institutions as the rulers would improve, if they knew that they were defective, will be improved as the rulers themselves become sensible of their defects. Such defective institutions as the

rulers would not wish to see improved, will never be improved, unless the knowledge of these defects is diffused among the people, and excites among them a disapprobation which the rulers do not think it prudent to disregard.

That the prevalence of true opinions among the people, relative to those defects in their political institutions, by which the rulers profit at their expence, is of the utmost importance to the people, is therefore a proposition, which no improbity will dare openly to controvert. That freedom of discussion is the only security which the people can have for the prevalence of true opinions has already been proved. It is therefore proved, that freedom of discussion, in its utmost perfection, they ought to enjoy.

What is included in the term *freedom of discussion,* is evident from what has already been said.

Freedom of discussion means the power of presenting all opinions equally, relative to the subject of discussion; and of recommending them by any medium of persuasion which the author may think proper to employ. If any obstruction is given to the delivering of one sort of opinions, not given to the delivering of another; if any advantage is attached to the delivering of one sort of opinions, not attached to the delivery of another; so far equality of treatment is destroyed, and so far the freedom of discussion is infringed; so far truth is not left to the support of her own evidence; and so far, if the advantages are attached to the side of error, truth is deprived of her chance of prevailing.

To attach advantage to the delivering of one set of opinions, disadvantage to the delivering of another, is to make a choice. But we have already seen, that it is not safe for the people to let any body choose opinions for them. If it be said, that the people themselves might be the authors of this preference, what is this but to say, that the people

can choose better before discussion than after; before they have obtained information than after it? No, if the people choose before discussion, before information, they cannot choose for themselves. They must follow blindly the impulse of certain individuals, who, therefore, choose for them. This is, therefore, a pretence, for the purpose of disguising the truth, and cheating the people of that choice, upon which all their security for good government depends.

If these deductions are as clear and incontrovertible as to us they appear to be, the inquiry respecting the principles which ought to regulate the use of the press is drawn pretty nearly to its close. We have shown, that as far as regards the violation of the rights of individuals, in respect to both persons and things, no definition on account of the press is required. We have shown in what manner the rights of individuals, in regard to reputation, should be defined by the civil code, and the violation of them prevented by the penal. We next proceeded to what may be considered as the main branch of the inquiry, namely, the use of the press in speaking of the institutions and functionaries of government. We have found, that in this respect the freedom of the press is of such importance, that there is no security for good government without it. We have also found, that the use of it, in respect to these subjects, admits but of two useful restrictions; —that of a direct exhortation to obstruct any of the operations of government in detail, and that of imputing to a functionary of government a criminal act, which there was no ground, nor even any appearance of ground, to impute to him. These restrictions, of course, it would be very easy to define in the criminal code, and to find appropriate motives to sanction. In all other respects, we have seen that the press ought to be free; that if there is any limit to the power of delivering unfavourable opinions,

respecting either the functionaries, or the institutions of government, and of recommending those opinions by any media, with the single exception of false facts, under the circumstances mentioned above, the benefits which may be derived from the freedom of the press are so greatly infringed that hardly any security for good government can remain.

Limitations to Freedom of Discussion, which involve its destruction.

In the administration of English law, or rather of what is called law, upon this subject, without being any thing better than the arbitrary will of the judges, it is said, that though discusssion should be free, it should be "decent;" and that all "indecency" in discussion should be punished as a libel. It is not our object in this discourse to give an exposition of the manifold deformities of the English law of libel. If we have been successful in developing the true principles which ought to regulate the freedom of the press, every reader may, by an application of those principles, determine what he ought to think of the several particulars which there may attract his attention. We shall confine ourselves to to a short notice of those *dicta,* or doctrines, which seem most likely to be pleaded in opposition to the principles which we have endeavoured to establish.

The question is, whether *indecent* discussion should be prohibited? To answer this question, we must, of course, inquire what is meant by indecent. In English libel law, where this term holds so distinguished a place, is it not defined?

English legislators have not hitherto been good at defining; and English lawyers have always vehemently condemned, and grossly abused it. The word "indecent," therefore, has always been a term under which it was not difficult, on each occasion,

for the judge to include whatever he did not like. "Decent," and "what the judge likes," have been pretty nearly synonymous.

Indecency of discussion cannot mean the delivery either of true or of false opinions, because discussion implies both. In all discussion there is supposed at least two parties, one who affirms and one who denies. One of them must be in the wrong.

The delivery, though not of all true opinions, yet of some, may be said to be indecent. All opinions are either favourable or unfavourable. True opinions that are favourable to government and its functionaries will not be said to be indecent; nor will all opinions that are true and unfavourable be marked out for prohibition under that name. Opinions unfavourable may either be greatly unfavourable or slightly unfavourable. If any unfavourable opinions are exempted from the charge of indecency, it must be those which are slightly so. But observe what would be the consequence of prohibiting, as indecent, those which are greatly unfavourable. A true opinion, greatly unfavourable to a functionary, or institution of government, is an opinion that the functionary, or institution, is greatly hurtful to the people. You would permit the slight evil to be spoken of, and hence removed; you would not permit the great evil to be spoken of.

If no *true* opinion can be regarded as indecent, meaning by indecent, requiring *punishment,* we must inquire if any *false* opinion on matters of government ought to be treated as such. If all false opinions are indecent, all discussion is indecent. All false opinions, therefore, are not indecent. The English libel law does not treat any favourable opinions, how much soever false, as indecent. If all opinions that are false and unfavourable are said to be indecent, who is to judge if they are false? It has been already proved, that the people can confide

the power of determining what opinions are true, what are false to none but themselves. Nothing can resist the following argument. Either the people do know, or they do not know, that an opinion is false: if they do not know, they can permit nobody to judge for them, and must leave discussion its free course: if they do know, all infliction of evil for the delivery of an opinion, which then can do no harm, would be purely mischievous and utterly absurd.

If all opinions, true and false, must be allowed to be delivered, so must all the media of proof. We need not examine minutely the truth of this inference, because it will probably be allowed. It will be said, however, that though all opinions may be delivered, and the grounds of them stated, it must be done in calm and gentle language. Vehement expressions, all words and phrases calculated to inflame, may justly be regarded as indecent, because they have a tendency rather to pervert than rectify the judgment.

To examine this proposition, it must be taken out of that state of vagueness in which so many things are left by the English law, and made, if possible, to speak a language, the meaning of which may be ascertained.

We have just decided, and as it appeared, on very substantial grounds, that the statement of no opinion, favourable or unfavourable, true or false, with its media of proof, ought to be forbidden. No language, necessary for that purpose, can be indecent, meaning here, as before, nothing by that term, as nothing can be meant, but simply *punishable,* or proper for punishment.

But the only difference between delivering an opinion one way and another way is, that in the one case it is simply delivered, in the other it is delivered with indications of passion. The meaning of the

phrase in question then must be, that an opinion must not be delivered with indications of passion.

What! not even a favourable one?

"Oh, yes! a favourable one. Merited *praise* ought to be delivered with warmth."

Here, then, is inequality, and therefore mischief, at once. An opinion, meaning here a true opinion, if it is favourable, you allow—if unfavourable, you do not allow—to be delivered in a certain way. Why? Because in that way, you say, it is calculated to make an undue impression. Opinions favourable, then, you wish to make an undue impression, and by that confess the wickedness of your intention. You desire that the people should think better of the institutions and functionaries of their government than they deserve; in other words, you wish the government to be bad.

If opinions, to what degree soever unfavourable, may be freely and fully delivered, there are two conclusive reasons why the terms in which they are delivered should not be liable to punishment. In the first place, the difference between one mode of delivery and another is of little consequence. In the second place, you cannot forbid the delivery in one set of terms, without giving a power of preventing it in almost all.

First, the difference is of little consequence. If I say barely that such a functionary of government, or such an institution of government, is the cause of great injury and suffering to the people, all that I can do more by any language is, to give intimation, that the conduct of such functionary, or the existence of such institution, excites in me great contempt, or great anger, or great hatred, and ought to excite them in others. But if I put this in the way of a direct proposition, I may do so, because then it will be a naked statement with regard to a matter of fact, and cannot be forbidden, without

overthrowing the whole of the doctrine which we have already established.

If, then, I give indication of certain sentiments of mine, and of my opinion of what ought to be the sentiments of others *explicitly,* I ought, you say, to be held innocent; if *implicitly,* guilty. Implicity, or explicity, that is the difference, and the whole of the difference. If I say, that such a judge, on such an occasion, took a bribe, and pronounced an unjust decision, which ruined a meritorious man and his family, this is a simple declaration of opinion, and ought not, according to the doctrine already established, to meet with the smallest obstruction. If I also state the matter of fact with regard to myself, that this action has excited in me great compassion for the injured family, and great anger and hatred against the author of their wrongs, this must be fully allowed. I must further be allowed to express freely my opinion, that this action ought to excite similar sentiments in other members of the community, and that the judge ought to receive an appropriate punishment. Much of all this, however, I may say in another manner. I may say it much more shortly by implication.—Here, I may cry, is an act for the indignation of mankind! Here is a villain, who, invested with the most sacred of trusts, has prostituted it to the vilest of purposes! Why is he not an object of public execration? Why are not the vials of wrath already poured forth upon his odious head?—All this means nothing, but that he has committed the act; that I hate him for it, and commiserate the sufferers; that I think he ought to be punished; and that other people ought to feel as I do. It cannot be pretended, that between these two modes of expression, the difference, in point of real and ultimate effect, can be considerable. For a momentary warmth, the passionate language may have considerable power. The permanent opinion formed of the character of the man, as well as the

punishment, which, under a tolerable administration of law, he can sustain, must depend wholly upon the real state of the facts; any peculiarity in the language in which the facts may have been originally announced soon loses its effect. If that language has expressed no more indignation than what was really due, it has done nothing more than what the knowledge of the facts themselves would have done. If it has expressed more indignation than what was due, the knowledge of the facts operates immediately to extinguish it, and, what is more, to excite an unfavourable opinion of him who had thus displayed his intemperance. No evil then is produced; or none but what is very slight and momentary. If there should be a short-lived excess of unfavourable feeling, we have next to consider what is the proper remedy. Punishment should never be applied, where the end can be attained by more desirable means. To destroy any excess of unfavourable feeling, all that is necessary is, to show the precise state of the facts, and the real amount of the evil which they import. All excess of feeling arises from imputing to the facts a greater efficacy in the way of evil than belongs to them. Correct this opinion, and the remedy is complete.

Secondly, you cannot forbid the use of passionate language, without giving a power of obstructing the use of censorial language altogether. The reason exists in the very nature of language. You cannot speak of moral acts in language which does not imply approbation and disapprobation. All such language may be termed passionate language. How can you point out a line where passionate language begins, dispassionate ends? The effect of words upon the mind depends upon the associations which we have with them. But no two men have the same associations with the same words. A word which may excite strains of emotion in one breast, will excite none in another. A word may appear

to one man a passionate word, which does not appear so to another. Suppose the legislature were to say, that all censure, conveyed in passionate language, shall be punished, hardly could the vices of either the functionaries or the institutions of government be spoken of in any language which the judges might not condemn as passionate language, and which they would not have an interest, in league with other functionaries, to prohibit by their condemnation. The evil, therefore, which must of necessity be incurred by a power to punish language to which the name of *passionate* could be applied, would be immense. The evil which is incurred by leaving it exempt from punishment is too insignificant to allow that almost anything should be risked for preventing it.

Religion, in some of its shapes, has, in most countries, been placed on the footing of an institution of the state. Ought the freedom of the press to be as complete, in regard to this, as we have seen that it ought to be, in regard to all other institutions of the state? If any one says that it ought not, it is incumbent upon him to show wherein the principles, which are applicable to the other institutions, fail in their application to this.

We have seen, that, in regard to all other institutions, it is unsafe for the people to permit any but themselves to choose opinions for them. Nothing can be more certain, than that it is unsafe for them to permit any but themselves to choose for them in religion.

If they part with the power of choosing their own religious opinions, they part with every power. It is well known with what ease religious opinions can be made to embrace everything upon which the unlimited power of rulers, and the utmost degradation of the people, depend. The doctrine of *passive obedience* and non-resistance was a *religious doctrine.* Permit any man, or any set of men, to say what

shall, and what shall not, be religious opinions, you make them despotic immediately.

This is so obvious, that it requires neither illustration nor proof.

But if the people here, too, must choose opinions for themselves, discussion must have its course; the same propositions which we have proved to be true in regard to other institutions, are true in regard to this; and no opinion ought to be impeded more than another, by any thing but the adduction of evidence on the opposite side.

JOHN LOUIS DE LOLME (1740-1807)

De Lolme was born at Geneva and in his youth was a practising lawyer. He came to England in 1769, and set himself to the study of its government, being led thereto by his experience of political troubles in Switzerland. He began writing after being about one year in England, and his book "The Constitution of England" written in French, was first published in Holland within the next year, one author says in 1773. A translation was published in England in 1775. It is curious that the preface to the "Letters of Junius" written as early as November 1771, concludes with a quotation from De Lolme's work, which it describes as "a performance, deep, solid, and ingenius." This fact led to the conjecture that De Lolme and Junius were the same person. Alibone's "Dictionary of Authors," mentions nine editions of this valuable book, and concludes the brief notice with these words. "De Lolme has been blamed for too excessive and general admiration of the Constitution of England; but this is a point we think, in which exaggeration is not easy. The merits of this work, are unquestionable. Lords Chatham and Camden commend it highly." De Lolme was called by D'Israeli "the English Montesquieu." Bentham comparing him with Blackstone says: "Our author has copied, but De Lolme has thought."

RIGHT OF RESISTANCE

By J. L. DeLolme

But all those privileges of the people, considered in themselves, are but feeble defences against the real strength of those who govern. All those provisions, all those reciprocal rights, necessarily suppose that things remain in their legal and settled course: what would then be the resource of the people, if ever the prince, suddenly freeing himself from all restraint, and throwing himself, as it were, out of the constitution, should no longer respect either the person or the property of the subject, and either should make no account of his conventions with the Parliament, or attempt to force it implicitly to submit to his will?—*It would be resistance.*[1] Without entering here into the discussion of a doctrine which would lead us to inquire into the first principles of civil government, consequently engage us in a long disquisition, and with regard to which, besides, persons free from prejudices agree pretty much in their opinions, I shall only observe here (and it will be sufficient for my purpose) that the question has been decided in favour of this doctrine by the laws of England, and that re-

(1) It is to resistance to tyranny and injustice that we owe the preservation of our common laws, and all the statutes which secure our civil, political, and religious liberties. Those rights can never be termed concessions from the Crown; they were mere acts by which the sovereign entered into new contracts, and by which he bound himself not to invade the natural and legal liberties of his subjects. It was by resistance that King John was compelled to sign Magna Charta; and it was by resistance that subsequent kings were not only obliged to confirm that charter, but to enter into fresh contracts binding them not to exercise tyrannical assumptions. It was resistance that gave us the Petition of Right, the Habeas Corpus Act, the Bill of Rights, the Reform Act (a), and Free Trade. But when laws are constitutionally passed, no people are so remarkable as the subjects of Great Britain for implicitly obeying those laws. By resistance we do not mean direct opposition to the laws, but the moral weight of public opinion, as expressed out of doors and in Parliament, against bad and pernicious laws, or the measures of an unjust ministry, or against the Crown itself if it should attempt an undue or severe exercise of prerogative.—*Ed.*

sistance is looked upon by them as the ultimate and lawful resource against the violences of power.

It was resistance that gave birth to the Great Charter, that lasting foundation of English liberty, and the excesses of a power established by force were also restrained by force.[2] It has been by the same means that, at different times, the people have procured the confirmation of the same charter. Lastly, it has also been the resistance to a king who made no account of his own engagements that has, in the issue, placed on the throne the family which is now in possession of it.[3]

(') Lord Lyttleton says, extremely well, in his Persian Letters,—"If the privileges of the people of England be concessions from the Crown, is not the power of the Crown itself a concession from the people?" It might be said with equal truth, and somewhat more in point to the subject of this chapter,—If the privileges of the people be an encroachment on the power of kings, the power itself of kings was at first an encroachment (no matter whether effected by surprise) on the natural liberty of the people.

(') The Senate had procured a seal to be made, to be affixed to their official resolution, in case the King should refuse to lend his own. The reader will find more particulars concerning the former government of Sweden in the nineteenth chapter.

Regulations of a similar nature had been made in Denmark, and continued to subsist, with some variations, till the revolution which in the seventeenth century, placed the whole power of the state in the hands of the Crown, without control. The different kingdoms into which Spain was formerly divided were governed in much the same manner.

And in Scotland, that seat of anarchy and aristocratical feuds, the great offices in the state were not only taken from the Crown, but they were moreover made hereditary in the principal families of the body of nobles: such were the offices of high admiral, high steward, high constable, great chamberlain, and justice-general: this last office implied powers analogous to those of the Chancellor and the Chief Justice of the King's Bench, united.

The King's minority, or personal weakness, or, in general, the difficulties in which the state might be involved, were circumstances of which the Scotch leaders never failed to avail themselves for invading the governing authority. A remarkable instance of the claims which they used to set forth on those occasions, occurs in a bill that was framed in the year 1703, for settling the succession to the Crown, after the demise of the Queen, under the title of *An Act for the Security of the Kingdom.*

The Scotch Parliament was to sit by its own authority every year, on the first day of November, and adjourn itself as it should think proper.

The King was to give his assent to all laws agreed to, and offered by, the estates; or commission proper officers for doing the same.

A committee of one-and-thirty members, chosen by the Parliament

This is not all: this resource, which till then had only been an act of force opposed to other acts of force, was, at that aera, expressly recognized by the law itself. The Lords and Commons, solemnly assembled, declared that "King James the Second, having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people, and having violated the fundamental laws, and withdrawn himself, had abdicated the government, and that the throne was thereby vacant."[4]

And lest those principles, to which the revolution thus gave a sanction, should, in process of time become mere *arcana* of state, exclusively appropriated, and only known to a certain class of subjects, the same act, we have just mentioned, expressly ensured to individuals the right of publicly preferring complaints against the abuses of government, and, moreover, of being provided with arms for their own defence. Judge Blackstone expresses himself in the following terms, in his Commentaries on the Laws of England:—"To vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the King and Parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence."

Lastly, this right of opposing violence, in whatever shape, and from whatever quarter it may come, is so generally acknowledged, that the courts of law have sometimes grounded their judgments upon it.

were to be called the King's Council, and govern during the recess, being accountable to the Parliament.

The King was not to make any foreign treaty without the consent of Parliament.

All places and offices, both civil and military, and all pensions formerly given by the King, were ever after to be given by Parliament.

See Parliamentary Debates, A. 1703.

(4) The Bill of Rights has since given a new sanction to all these principles.

I shall relate on this head a fact which is somewhat remarkable.

A constable, being out of his precinct, arrested a woman whose name was *Anne Dekins;* one *Tooly* took her part, and, in the heat of the fray, killed the assistant of the constable.

Being prosecuted for murder, he alleged, in his defence, that the illegality of the imprisonment was sufficient provocation to make the homicide *excusable,* and entitle him to the benefit of clergy. The jury, having settled the matter of fact, left the *criminality* of it to be decided by the judge, by returning a *special verdict.* The cause was adjourned to the Queen's Bench, and thence again to Serjeant's Inn, for the opinion of the twelve judges. Here follows the opinion delivered by Chief Justice Holt, in giving judgment:-

"If one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people, out of compassion, much more so when it is done under colour of justice; and when the liberty of the subject is invaded, it is a provocation to all the subjects of England. A man ought to be concerned for *Magna Charta* and the laws; and if any one against law imprison a man, he is an offender against Magna Charta." After some debate, occasioned chiefly by Tooly's appearing not to have known that the constable was out of his precinct, seven of the judges were of opinion that the prisoner was guilty of manslaughter, and he was admitted to the benefit of clergy.[5]

But it is with respect to this right of an ultimate resistance that the advantage of a free press appears in a most conspicuous light. As the most important rights of the people, without the prospect of a resistance which overawes those who should attempt to violate them, are little more than mere shadows, so this right of *resisting,* itself, is but vain when there ex-

(5) See Reports of Cases argued, debated, and adjudged, *in Banco Reginae,* in the time of Queen Anne.

ist no means of effecting a general union between the different parts of the people.

Private individuals, unknown to each other, are forced to bear in silence injuries in which they do not see other people take a concern. Left to their own individual strength, they tremble before the formidable and ever ready power of those who govern; and as the latter well know (and are even apt to overrate) the advantages of their own situation, they think that they may venture upon anything.

But when they see that all their actions are exposed to public view,—that, in consequence of the celerity with which all things become communicated, the whole nation forms, as it were, one continued *irritable* body, no part of which can be touched without exciting an universal *tremor,*—they become sensible that the cause of each individual is really the cause of all, and that to attack the lowest among the people is to attack the whole people.

Here, also, we must remark the error of those who, as they make the liberty of the people consist in their power, so make their power consist in their action.

When the people are often called to act in their own persons, it is impossible for them to acquire any exact knowledge of the state of things. The event of one day effaces the notions which they had begun to adopt on the preceding day; and amidst the continual change of things, no settled principle, and, above all, no plans of union, have time to be established among them. You wish to have the people love and defend their laws and liberty,—leave them, therefore, the necessary time to know what laws and liberty are, and to agree in their opinion concerning them. You wish an union, a *coalition,* which cannot be obtained but by a slow and peaceable *process,*—forbear, therefore, continually to shake the vessel.

Nay, farther, it is a contradiction that the people should *act,* and at the same time retain any legal power. Have they, for instance, been forced by the

weight of public oppression to throw off the restraints of the law, from which they no longer received protection?—They presently find themselves suddenly become subject to the command of a few leaders, who are the more absolute in proportion as the nature of their power is less clearly ascertained; nay, perhaps they must even submit to the toils of war, and to military discipline.

If it can be in the common and legal course of things that the people are called to move, each individual is obliged, for the success of the measures in which he is then made to take a concern, to join himself to some party; nor can this party be without head. The citizens thus grow divided among themselves, and contract the pernicious habit of submitting to leaders. They are, at length, no more than the clients of a certain number of patrons; and the latter, soon becoming able to command the arms of the citizens in the same manner as they at first governed their votes, make little account of a people, with one part of which they know how to curb the other.

But when the moving springs of government are placed entirely out of the body of the people, their action is thereby disengaged from all that could render it complicated, or hide it from the eye. As the people thenceforward consider things speculatively, and are, if I may be allowed the expression, only spectators of the game, they acquire just notions of things; and as these notions, amidst the general quiet, gain ground and spread themselves far and wide, they at length entertain, on the subject of their liberty, but one opinion.

Forming thus, as it were, one body, the people at every instant have it in their power to strike the decisive blow which is to level everything. Like those mechanical powers, the greatest efficiency of which exists at the instant which precedes their entering into action, it has an immense force, just because it

does not yet exert any: and in this state of stillness, but of attention, consists its true *momentum.*

With regard to those who (whether from personal privileges, or by virtue of a commission from the people) are intrusted with the active part of government, as they, in the meanwhile, see themselves exposed to public view, and observed as from a distance by men free from the spirit of party, and who place in them but a conditional trust, they are afraid of exciting a commotion, which, though it might not prove the destruction of all power, yet would surely and immediately be the destruction of their own. And if we might suppose that, through an extraordinary conjunction of circumstances, they should resolve among themselves upon the sacrifice of those laws on which public liberty is founded, they would no sooner lift up their eyes towards that extensive assembly, which views them with a watchful attention, than they would find their public virtue return upon them, and would make haste to resume that plan of conduct, out of the limits of which they can expect nothing but ruin and perdition.

In short, as the body of the people cannot act without either subjecting themselves to some power, or effecting a general destruction, the only share they can have in a government, with advantage to themselves, is not to interfere, but to influence—to be able to act, and not to act.

The power of the people is not when they strike, but when they keep in awe: it is when they can overthrow everything, that they never need to move; and Manlius included all in four words, when he said to the people of Rome,—*Ostendite bellum, pacem habebitis.*

JOHN CARTWRIGHT (1740-1824)

At the age of 18 Cartwright entered England's navy and had some active service under Lord Howe. Having inventive genius, he rose rapidly in the service. In 1766 he was appointed first lieutenant of the *Guernsey,* on the Newfoundland station, and the following year was made deputy commissioner to the vice-admiralty court in the island. Two years later Lord Howe offered Cartwright a first lieutenancy with an invitation to join the forces against America. Cartwright's sympathy for the American cause precluded him from accepting, and thus was terminated his professional advance. In 1775 he had been appointed Major of the Nottinghamshire Militia. In the same year he began publicly asserting himself by entering upon a public controversy with Burke upon the American situation, taxation, and American independence. This was his entrance upon a career which earned him the title of "Father of Reform." He promoted the establishment of the famous "Society for Constitutional Information" and the "Friends of Liberty of the Press." Having attended a public meeting to celebrate the taking of the Bastile, his promotion in the militia was withheld, and his commission at length altogether cancelled. However, his position as a country gentleman insured him continuing respect. In 1813 he was arrested in the course of a political tour, but soon released. In 1820 he was tried for sedition, and fined 100 pounds. This seems rather remarkable since Cartwright was a monarchist, opposing the republican propaganda of Thomas Paine, and insisting only upon parliamentary reform. "Cartwright was one of the most generous men of his time. His writings are excessively dry to the ordinary reader, and quite significant of the enthusiast who could be earnest without being inflamatory." Upward of eighty tracts besides some

books were published by him. He was also in active cooperation with Clarkson, Granville, Sharp and other anti-slavery leaders. On June 5, 1824, Thomas Jefferson wrote a long and friendly letter to Cartwright, in approbation of the very book from which the following pages are extracted. Alibone quotes the Rt. Hon. Charles James Fox as eulogizing Cartwright in the following words: "He was one whose enlightened mind and profound constitutional knowledge placed him in the highest rank of public character, and whose purity of principles and consistency of conduct through life commanded the most respectful attention to his opinions." T. S.

Ed. Note: — What follows is extracted from Cartright's once famous "The English Constitution Produced and Illustrated." Now it seems a misfortune that the author chose to present his thoughts in the form of a dialogue. However, here it is reproduced as found in the edition of 1823 between pages 350 and 364; 104 and 115; also page 122.

RESISTANCE AND ARMSBEARING

By John Cartright

But such is the importance of the point, that, for giving you some practical knowledge of our constitutional artillery of principles and fundamental laws, after referring you to the second article of our Polity, and its subjoined vindication and illustration, I shall submit to you a series of observations, facts, and inferences. To go at once into the pith of the argument, we will suppose it asked, *"In what case is it just and lawful to resist the exercise of power?"* The obvious answer is: *"In all cases in which power is unjustly and unlawfully exercised."* For surely, as *Bolingbroke* observes, there cannot be a greater absurdity, than to affirm that "the People have a remedy in *resistance,* when their prince attempts to enslave them: but that they have none, when their *representatives* sell themselves and them."[6] How else could the machine of the national polity be kept in order and made to do its work for the good of the People, which is the end and object of all authority? *Resistance* is therefore not only a *right,* but a *duty.*

In an age like the present, if the nation be true to itself, *Truth* is the only weapon of *resistance* we need to use; for *Truth,* when by any nation duly attended to, will ever triumph. We take it to be self-evident, that, were things in a right train, that is, were the Nation, the Legislature, and the First Magistrate, respectively, in full possession of their own proper sovereignty, an *unjust and unlawful* exercise of power would be an unimaginable case. Error, indeed,

(*) Letters on the Study of History, Letter V, [p. 49, of Ward Locke & Co-London Edition.]

might occur; but its occurrences would produce its correction. It is *intention* that constitutes criminality, in *the unlawful exercise of power.* In the case supposed, a case to which we trust radical reform is conducting us, there could not be an unjust and unlawful exercise of authority. "When complaints are freely heard," says *Milton,* "deeply considered, and speedily reformed, then is the utmost *bound* of liberty attained, that wise men look for."[7] Such a "bound" it is the object of a radical reform of parliament to establish.

It is when some great deviation from the principles of our polity has taken place; it is when some high prerogative of the Nation, of the Legislature, or of the First Magistrate, has been violated, abridged, or destroyed; that *resistance* in its serious forms, according to circumstances, and proportioned to the exigency, is necessary.

Touching any abridgement of the power of the Parliament *de facto,* we have at present no case to put. That power is at least in full plumage. We think it soars much too high. But how stands it with the power of the King? Is it all in his own possession, and does it give him constitutional independence? It is the intendment of the Constitution, that the Crown shall have its reliance for revenue on the sovereign Nation; a Nation proverbial for its generosity, speaking through an assembly truly representing its majesty, its greatness, and its virtues; a Nation which, having no object but its own good and its own dignity, and secure as it would then be of a faithful application of its resources, is ever ready to give and grant with the utmost liberality; and, to a patriot King, with even an improvident profusion.

But, instead of this, in the present state of what is called *Representation,* is it not manifest that, for every shilling of revenue, the King is dependent,—*not* on the Nation, but—on a *seat-selling faction of*

(7) Prose Works, Amsterdam Ed. 1698, p. 423.

corrupt traffickers in rotten boroughs? In this dependence of the King on the Boroughmongers, do we not in reality discover, that the despotic *Prerogative* ascribed to Him, with its boundless bribery, he is in fact compellible to exercise at the bidding, and for the profit, of his lords and masters, the Oligarchs, to the riveting of their detested yoke on the necks of himself and the People? Is this the proper condition of a King of England? Is not this a thing to be *resisted?* Or were it less an object of *resistance,* were a prince on the throne so misled, or so corrupt, as to truckle to the vile usurpers? Or, were he so unadvised and infatuated as to make the faction *partners in his throne,* partakers in his executive sovereignty, and sharers in his power? Such a circumstance, should it ever occur, would, in our judgment, give tenfold force to the necessity of *resistance.*—But have not, in fact, Cabinet Ministers been forced, by the Oligarchs, upon our Kings against their will and avowed dislike?

We are not, however, constrained merely to reason on *resistance* to any *unjust and unlawful* exercise of power, as a necessary principle of free government; for it is conspicuous as a doctrine of *our written code;* and there, when the necessity may arrive, we find it *enjoined* on the People. By *Magna Charta* it was enacted, that the People should "have all their antient right, liberties and free customs;"—that *"all evil customs should be utterly abolished so as never to be restored";*—that "all foreign troops should be sent out of the kingdom;"—that "full justice should be done to all complainants;"—that, as "a security for the *amendment of the kingdom,* and for quieting all discord, five-and-twenty barons should by the rest be chosen, who should take care, with all their might, that the peace and liberties should be observed."

That in case of failure on the part of the King, by his not affording "a redress of the grievances laid open to him by *Petition,* within 40 days, the said five-

and-twenty barons, together with the *community of the whole kingdom,* should distrain and distress him [the King] all the ways possible; namely, by seizing his castles, lands, and possessions, and in any other manner they could, *till the grievances should be redressed,* saving harmless only the person of himself, his queen, and children;"—"that *any person whatever* might swear to obey the orders of the said barons, and that to the utmost of his power he would, jointly with them *distress the King,* and would not hinder any person from taking the said oath;"—nay, that "as for all those who would not of their own accord so swear, he (the King) would issue his order to make them take the said oath;"—and it was also *sworn,* as well on the King's part as on the part of the Barons, that " all the things aforesaid should faithfully and sincerely be observed."—Given under the King's hand, in the presence of the witnesses, in the meadow called *Runing Mead,* between *Windlesore* and *Staines,* the 15th day of June, 1215."

From this monument of baronial patriotism, so comprehensive and yet so minute in its provisions, so energetic and so decisive in its conditions, it is evident that, as far as the science of civil government and the nature of political liberty were, at that day of feudalism, understood by the English barons, particularly by the words, "*for the amendment of the kingdom,*" and "*that all evil customs should be abolished,* so as never to *be restored;*" they honestly intended *radical reform*; for no one can impute to them having intended to do their work by *halves;* or call them *gradual* Reformers. Although the article were *seventy-nine* in number, they were struck off at one heat.

Political science is now somewhat advanced, when it is clearly seen, that the complete and *lasting* means to the "*amendment of the kingdom and abolishing all evil custom,*" lies in the *sixteenth part* of the compass of *Magna Charta,* that is, in only *five articles. Mag-*

na Charta "only pruned the luxuriances of the feudal system[8];" and was scarcely signed and sealed ere followed by a constant succession of new oppressions; and even a bloody and ruthless war made on the People by the perjured *John,* in our day so exactly imitated by two *Bourbon Ferdinands. The Constitution,* divinely simple, and resting on principles of eternity, promises, as far as human reasons can penetrate, tranquillity, freedom and prosperity, to the end of time.

We come now to the celebrated *Bill of Rights,* an Act declaring "the Rights and Liberties of the subject, and settling the succession of the Crown." This Act says, "the Crown shall be and continue to their said Majesties and the survivor of them." It then proceeds to entail it first, on the issue of *Mary;* then, second, on the princess, afterwards Queen *Anne;* third, on her issue: fourth, on the issue of *William.* After all this, it enacts, "That all and every person and persons, that is, are, or shall be reconciled to, or shall hold communion with, the See or Church of *Rome,* or shall profess the *Popish* religion, or shall *marry a Papist,* shall be *excluded* and be forever incapable to inherit, *possess,* and *enjoy* the Crown and Government of this realm; and in all and every such case and cases, *the People* of these realms shall be, and are hereby *absolved of their allegiance.* In support of the settlement, the Parliament, in the name of all the People, faithfully promise, that *they will stand to, maintain, and defend their said Majesties,* and also the limitation and succession of the Crown herein specified and contained, to the utmost of their power, with their *lives* and estates, against all persons whatsoever that shall attempt any thing to the contrary."

As *allegiance* is not due to an heir, but only to a King, here there is a case in which the People, by a second *Magna Charta,* are bound, not merely to

(8) Blackstone's Commentaries, vol. IV, p. 438.

stand upon a defensive *resistance* against a violation of law; but if the King shall either become, or marry a Papist, they are to be *"absolved of their allegiance,"* and he is to be driven from the throne by force of arms. A stronger exemplification of the constitutional doctrine of *resistance* to any unjust or *unlawful exercise of power* by the Crown, it is not possible to conceive.—Then, with *Magna Charta* and the *Bill of Rights,* I say again, rather than *Slavery,* give us *Civil War!*

Civil War for principles and opinions will vary according to the state of knowledge. Between *Error* and *Error,* in ages of darkness, it may be durable. Between Error and Truth, in an age of light, it must be short. In either case the contest is between *Men* and *Men:* but a military Despotism is a *never-ceasing war* between an army of *martyrs* without arms, and an army of *demons* with arms. Rather than this, Give us, I say again, *Civil War!* In the last extremity there cannot be *resistance* without *civil war;* but we see *resistance enjoined us as a* DUTY by the statutes most conspicuous for the assertion of our *rights.*

So accordingly and nobly, in the *unconstitutional* American War of the last century, did the honest Earl of *Abingdon* maintain that "Obedience is due to the Laws when founded on the Constitution; but when they are subversive of the Constitution, then *disobedience* instead of obedience is due, and *Resistance becomes the Law of the Land."*[9] And in a debate on Lord *Grenville's* Gagging Bill of 1795, the same virtuous nobleman declared, that, "if the compacts settled by the *Bill of Rights* were broken, it might happen that the *Government* might be in a *state of rebellion against the People."*[10] If Lord *Abingdon* were now living, it might puzzle him to find a clause of that Bill of Rights *which is not broken.* But what is worse, he assuredly would not

(9) Thoughts on Letters of Burke to Sheridan, of Bristol, p. 17.

(10) History of the Two Acts, p. 188.

find a single Element of the Constitution *whole;* save only the *first;* which, being entirely of a spiritual nature and heavenly temper, the Devil himself, with all the powers of Pandemonium at his back, cannot break.

Even *Blackstone* admits "the natural right of *resistance* and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[11]

Such, my friend, is the constitutional doctrine of *Resistance;* which, as soon as the *English People* shall have recovered the *English Constitution,* can no more have motive or existence. And whatever may continue to be the wanton excesses of lawless power, whatever may be the craft and servility of lawyers, whatever may be the multitude of barracks, whatever may be the muster-roll of a standing-army, or the overstrained power of Parliament,—yet the People, in this enlightened and active age, if they shall not sleep over their wrongs, have nothing to fear. Their *resistance* will find more force in JUSTICE, than their oppressors in the Bayonet; more potency in TRUTH, than their enemies in POWDER and BALL; more effect from FREE DISCUSSION, than tyrants from *Cavalry* and *Infantry* with their whole train of *Artillery.*

To recur again to the topic of *Civil War,* (which, delivering a mere *opinion,* I certainly prefer to a state of slavery,) it must always be asked—"Whenever it occurs, who are the criminal parties? They whose oppressions are its cause; or they who, by hard necessity, are driven into it? They who, having stolen the powers of legislation and the nation's sword, have for ages *actually carried on a war against an unresisting People with a cruel and unrelenting perseverance;* or they who, at length, as the sole means left for self-preservation, turn on their

(11) History of the Two Acts, p. 144.

wicked oppressors? They who use the stolen sword, to rivet on their country's neck a Turkish tyranny with its inhuman massacres; or they who nobly rise to shake off the galling yoke, and recover the Constitution of their illustrious ancestors?"

A. There is in your words that which I feel in every nerve! My intellect, my heart, my soul, are all in unison with yours! Doubtless, it is the Oppressor who breaks, the resisting Patriot who obeys, the Law. —But I will not interrupt you. Go on, my friend!

C. In *our written code,* there is additional evidence to prove the right and duty of *resistance* to power, when *unjustly exercised.* And of course, more particularly when, according to Lord *Abingdon,*—an *Abdiel* faithful among the unfaithful!—"a Government is in a state of rebellion against the People."

From the honest *Samuel Johnson* (Chaplain to that Lord *Russell* who, *in such a resistance,* fell a victim,) We are reminded that, by an Act of the 42d of *Henry III.,* (*omitted* in the Statute Book) in reference to *resistance,* it is said, "men in our realm may lawfully rise up against us, and annoy us with might and main, as if they were under no obligation to us. And in case I break my oath (which God forbid) the inhabitants of this realm shall not be bound to yield to us any obedience."[12]

"It was," says he again, "always lawful for vassals to make war upon their lords, if they had just cause: so our Kings did perpetually upon the Kings of *France,* to whom they were vassals all the while they held their territories in that kingdom. And by the law of England, an inferior vassal might fight his lord in a weighty cause, even in duel."—"This was the standing law long before the time of King *John's* barons; for the Parliament, in the 10th of *Richard* II., sent the King a solemn message, that

(12) In Archives of London.

by an antient statute, they had power to depose a King that would not behave himself as he ought, nor be ruled by the laws of the realm. And they instance in the deposing of *Edward* II., as a modern thing, in respect of the antiquity of that statute."

After a confirmation of his doctrine by a passage from *Bracton,* he adds, "I might multiply quotations out of *Fleta* and others, to the same purpose; but what I have set down is sufficient; and therefore I shall rather take this occasion to admire the wisdom of the *English Constitution,* which seems to be built for perpetuity."—"For how can a Government fail which has such *principles* within it, and a several respective remedy lodged in the very bowels of it?"[18]

When, on the testimony of Sir *Edward Coke,* we also find, that in his time *"Magna Charta* had been confirmed, established and commanded to be put in execution, by TWO-AND-THIRTY several *Acts of Parliament,"* have we not here the doctrine of Resistance two-and-thirty times reiterated, by solemn declarations of the Legislature, that, to *resist* the exercise of unlawful power by the King, or the Government, is our duty?

But here, please to observe, that in the Index to the Statutes by *Ruffhead and Runnington,* under the word—King,—we find *"Resistance* of evil administration, by War, *justified;"* when, turning to the Statute referred to, we find it mere trash; while the *Runing Mead Magna Charta,* that spoke so much to the purpose, and had had so many parliamentary confirmations, is *denied a place in the book,* but a *later* charter of *Henry* III., which *says not a syllable about Resistance* insidiously usurps its place at the head of the Statutes!!!—Have we not here, one of those innumerable instances, for proving a widespread conspiracy against freedom, which *brands the law and literature of the age with indelible infamy!*

(18) P. 273, 275.

When *Henry* III., in 1225, desired a *fifteenth,* for recovering his dominions in *France,* "though many of the Earls and Barons had thereby lost their inheritances as well as the King, yet the whole assembly agreed in this answer:—*That they would freely grant the King what he desired, but upon condition, if he would grant them their long desired liberties.* Upon this, *Henry* has Charters presently written and sealed, and sent to all the counties, and an oath in writing, for all men to swear to them. *Mathew Paris* forbore to recite the tenor of these Charters, because he had done it before in King *John's* reign, for the Charters of both Kings were alike. *In nullo inveniuntur dissimiles."* So says *Johnson,* p. 349.

Rapin's account is as follows. "The Parliament told him, they would readily grant him the aid he required, provided the Charters of King *John,* which had *all along been neglected,* were punctually observed for the future. The King's *circumstances* not suffering him to deny their request, he granted it in a handsome manner, and even sent into every county *Commissioners* to see the Charters executed."[14]
I wish now to learn the sentiments of our companion, who is not only learned in the law, but, what is far better, understands and reverences the Constitution.

B. I heartily subscribe to all that has been said; and, although old enough to be our young friend's grandfather, my frame glows with all that he feels on a point so interesting to Englishmen. Having, however, disposed of what relates to *constitutional Resistance,* we may now return to the general subject, and congratulate our country on having for our guidance a *written Constitution,* as intelligible as the Ten Commandments and in half their compass;—a Constitution whereof the soul is Representation, which, in those feverish times spoken of by the late Lord *Liverpool,* was very imperfectly compre-

(14) Mathew Paris—P. 324. Heningford, p. 568. Ann Burton, p. 271.

hended, but is now matter of certain, sober knowledge, of complete conviction, and of a most powerful popular interest, no longer subject to Whig or Tory delusion.

By the great *Bacon,* it was sagaciously remarked that KNOWLEDGE IS POWER. Consequently, IGNORANCE IS IMBECILITY. Then, with the power of knowledge on the side of the Reformers, while *equal* and *complete* REPRESENTATION is a universal right and a universal good, which no Belial sophistry can explain away, nor all the music of meretricious eloquence can charm from the understandings and hearts of men, must not, on occasion of a mental agitation, the enlightened on this subject carry the day with a triumph which must deprive the champions of ignorance, despotism and pillage of any possible means of waging a successful *Civil War?* That bugbear may, therefore, be treated with the same contempt as the bugbear of *Revolution.*

A. It certainly surpasses the wisdom of a Socrates or of a Solomon to eradicate from the human intellect what it once knows. Man, so long as reason holds its seat, cannot be made to unlearn truths once implanted in him. They are part of his very nature. No device can separate them. But when they are essential to his self-preservation from slavery and ruin, he is from that moment a potent element of national resistance to despotism. Consequently such knowledge, when universal, is volcanic matter under the whole of an unconstitutional, tyrannical and corrupt Government. If it explode, the tyranny is annihilated.

When, however, we contemplate those three Elements of our genuine Constitution, which are bottomed on *"self-preservation,"* it is abundantly manifest that no political conflict between a Nation on one hand, and its Legislators or Ministers on the other, can by possibility occur, except when, according to

Lord *Abingdon, "the Government is in rebellion against the People."*

1. When a strong man armed keepeth his house, his goods are in peace.[15]

2. In all ages and nations, free arms-bearing has been the distinction of a citizen from a slave.

3. "A Militia is the chief part of the Constitution of any free Government."[16]

4. It is as impossible to conceive the freedom of a disarmed nation, as the health of a full-grown man with the feebleness of a cradled infant.

5. The system of this second element of the Constitution is one of which equal liberty is the inspiring soul, and general liberty the happy result.

6. The English Constitution is a *civil* and *military* polity.

7. The *proper* English Militia, or *County Power,* consists of the whole physical strength of the community, from the duke to the peasant, who are required by the Constitution to be suitably armed and organized.[17]

8. The *County Power,* by its ubiquity and resistless force, whenever it shall be restored to full vigour and energy, will equally *prevent* the *possibility* of disgraceful riots, the *possibility* of serious rebellion, or the *possibility* of successful invasion.[18]

9. On the true principles of order,—the very bond of all society,—and by a beautiful, refined, yet simple mechanism, it organizes a community of free citizens into an invincible army; it communicates the sensibilities of the individual to the aggregate of society, and causes those energies, for resenting menace and repelling assault, which characterize a brave man, to adorn and dignify a great nation.

(15) New Testament. (See Luke, 11-21.)

(16) Fletcher Andrew of Saltoun's Political Works, by Dr. R. Watson, p. 142, (1797). Edition of 1722, p. 47.

(17) Sir William Jones' An Inquiry into the Legal Mode of Suppressing Riots. Edit. of 1819, p. 12.

(18) See this demonstrated in, An Appeal Civil and Military on the English constitution, and in England's Aegis.

10. Sir *William Jones,* in that gem of law literature, "The Legal Means of Suppressing Riots," has completely established, as written law, the existence of this universal duty of arms-bearing; and the frequent decisions, awarding damages to persons who suffer in their property by riots, confirms the doctrine.

11. When the court for "three centuries," as remarked by the late Earl of *Liverpool,* hath *systematically* undermined the *civil* energies of our free government, to furnish pretenses for *systematically* employing a Standing Army in keeping the peace; that a persuasion of the necessity of so doing may be established; and when riotous mischief hath ensued in consequence of the inhabitants being disarmed, and thereby disabled from defending themselves and neighbours, they receive in our courts of justice—of perverted law, I mean,—a rebuking lecture on *neglected duties;* they are told they are answerable "by the statute of *Winchester,* for felonies and robberies done among them"; which they ought to prevent or suppress by force of arms; and they are actually cast in damages to the full amount of the injuries sustained by those who have had their houses injured, pillaged or burned; which damages ought rather to be levied on *the criminal statesmen* of the day who have been parties to the *systematic* iniquity.

12. Thus, strange to tell, we have, and we have not, the ancient *County Power* for our protection! Its utility is insidiously taken from us, but we are made to smart under its penalties! Its duties we are not permitted to fulfill, but for the omission of them we receive punishment!

13. The martial arms and exercises peremptorily enjoined by the Constitution are forbidden by boroughmonger laws; and yet, for not successfully resisting insurrectionary violence, we are treated as criminals!

14. In a country whose "law and constitution *know no such state* (*as that of a perpetual standing*

soldier,"[19]) it is difficult to imagine a more malignant treason than that of *systematically* undermining the *Right* and *Duty* of universal armsbearing, as well as of *systematically* on all occasions foisting in the soldiery of a Standing Army to usurp the *civil* office of keeping the peace; which, of all possible violations, is in its nature the most atrocious, most dangerous and most destructive.

15. Whether a State be in reality under a *civil* and *free* government, or under a *military* and consequently a *despotic* government, must necessarily depend on the *means* whereby the *Law* can, in *all* weight *sible cases* be carried into complete effect. If such be the weight, strength and energy of the *civil* authorities, and their *means,* that, in *all possible cases,* the *Law* can be carried into full effect with absolute certainty, by the *civil* power, unarmed or armed as occasion may require; it is then, and then only, a *civil* state and *free* government. Whereas, if the *means* of the *civil* authorities have been so undermined, and paralysed or destroyed, that the *Law* cannot *in all possible cases* be thereby carried into complete effect; but a *military* force has to that end been artfully made *necessary;* then the government (whatever free *forms,* and *usages,* and *empty names,* may be cunningly allowed to remain) hath been treasonably revolutionized into a real despotism.[20]

16. "Those who command the arms of a country are masters of the state and can make what revolutions they please."[21]

17. "Where Government only is armed, there Despotism is established."[22]

18. The English County Power, "restored" (according to the anxious wish of Sir *William Jones*)

(19) Blackstone's Commentaries, vol. I, p. 408, 12th Ed. by Christian, 1795.

(20) Appeal Civil and Military on English Constitution, p. 173, by John Cartwright, London, 1799.

(21) Aristotle's, Polities and Economics, book VII, chap. IX, p. 249.

(22) Arthur Young's Travels in France, during the years 1787-9, p. 550.

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to full vigour and energy," must, by its *ubiquity* and resistless force, have the effect of *preventing* tumult which a Standing Army can only *quell,* and that perhaps when serious mischief has been done, as in London in 1780, and in Birmingham in 1794; while soldiers are quartered at *York,* rioters raze to the ground houses at *Sheffield;* while soldiers are stationed at *Nottingham,* rioters set *Birmingham* in flames. A Standing Army cannot, like a County Power, be *everywhere.*[23]

19. The late Lord *Castlereagh,* although as a minister and member of Parliament deeply criminal, in defrauding the Nation of this inestimable element of the Constitution, and in stabbing it to the vitals by upholding an immense Standing Army, had the effrontery to prosecute on the very law of *Posse Comitatus,* when a mob broke his windows for his conduct towards the Queen; and an ignorant Jury according to the summing up of the Justice on the Bench awarded him damages to the last pane of broken glass!

20. Self-preservation of the individual and of the community by *free arms,* differs essentially from self-preservation by *legislation.* In an extensive territory, *Legislation* necessarily must, and with safety may, be executed by *Deputies,* whose duties are performed at a central point of the territory; and who cannot enslave an armed people: whereas *armsbearing,* to be a defence either of the community or the individual, must be *personal;* and is equally required at every point and part of the territory. Besides, the defence of a *disarmed* People by a Standing Army, is in its very nature complete *Enslavement.*

21. Alfred, for correcting the excess of disorder caused by invasions and perpetual war, improved the organization of the *County Power* to such a degree of perfection, as ultimately crowned him with victory

(²³) Appeal Civil and Military on England Constitution, p. 149

over all the enemies of his country; which improvement likewise proved the means of an order, tranquillity and security throughout the kingdom, which for excellence hath no parallel in history.

22. Edward I. experiencing, from a relaxation of the system and other causes, "robberies, murders, burnings, theft," and a general confusion, he, by restoring discipline in the *County Power,* so that "every man should be assessed and sworn to armour"; and by re-enacting, that the inhabitants of each district "should be answerable for the felonies and robberies done among them," again restored tranquillity.[24]

23. By the 33d *Henry* VIII. c. 9, it is enacted, that if a *labouring man* be without his proper *Arms,* the master shall provide them and abate the price out of the servant's wages; and that every man child of seven years old shall be trained to arms, on a pain of grievous fine for neglect.

24. The late Earl of *Liverpool* in doing justice to "our Saxon ancestors, for wisely constituting *civil societies,*" yet, in reference to *that* part of their polity, remarks that "their *military* establishments were, however, the distinguishing part of their government; by these," says he, "they were *all* bound to the defence of their country: and the nature, indeed, of society seems to require, that they who enter into it for the preservation of their property, should *equally* join in repelling any attempt that may be made upon it. This obligation, therefore, was the common *fealty* and *allegiance* which *every* native owes, and which, if neglected, according to *the old Saxon Laws,* rendered the party guilty of *High Treason.*" But, says his Lordship in another page of the same book, "Arbitrary princes have for these *three last centuries*

(24) Stat. [ute of] Win[chester; also an] App[eal to the Nat[ion] 1812, p. 8.

(25) Discourse on National and Constitutional Force, (1757) p. 15; Appeal Civil and Military on English Constitution, p. 107.

neglected their *militias,* and *for their own views* rendered them *purposely useless* and undisciplined."[25]

25. Keeping in mind that the armed County Power is a *civil* institution, it is highly important to remark that, whether a State be in reality under a *civil,* and therefore a *free* government, or under a *military,* and consequently a *despotic* government, must depend on the Means whereby the *Law* can, in *all possible cases,* be carried into complete effect. If such be the power, the weight and strength of the *civil* authorities, that *in all possible cases,* the law can be completely enforced by the *civil* power, unarmed or armed, it is then a *civil* state and government. But if, on the contrary, the proper power of the *civil* authorities have, by the treacherous abusers of authority, been purposely and treasonably undermined and destroyed, so that the *Law* cannot *in all possible cases* be thereby carried into complete effect; but that it have become in any cases necessary to use the *military* force of a *Standing Army,* or any *military* force *other than the constitutionally armed County Power,* then it is demonstrated, that the government (whatever may be its remaining *free forms or appearances*) hath in reality been craftily and treasonably revolutionized into a Despotism.

26. "Obedience is due to the Laws, when founded on the Constitution; but when they are subversive of the Constitution, then disobedience instead of obedience is due and resistance becomes the Law of the Land."[26]

27. "When Legislators, who were set up for the service and protection of the people, their liberties and properties, shall attempt to enslave the Nation, or by force or fraud, or unconstitutional legislation, to take away those liberties and properties, such

(26) Lord Abingdon's Thoughts on the letter of Edmund Burke to the Sheriffs of Bristol, p. 17, by John Cartwright, Lond. 1778.

Legislators, in that case, are properly, and with the greatest aggravation, REBELS."[27]

28. Volunteer Corps raised, embodied, armed, clothed, officered and disciplined under any authority or influence, or regulated by any rules, *other than the true principles and regulation of the County Power,* are unconstitutional, unwarrantable and dangerous; as liable to be rendered subservient to the interests of the court instead of the country.

29. Yeomanry Corps composed of the dependent tenantry, tradesmen or partisans of men in power, which has, deservedly, obtained for them the appellation of the *Body Guard of the Boroughmongers,* are peculiarly to be reprobated; as the never-to-be-forgotten *Manchester Massacre* hath deeply engraven on every patriot heart.

In Support of the second element of the Constitution, enough has now been advanced.

A. Considering existing circumstances, in which the *Army List* is a *large volume,* and that, although every one can talk of the Sheriff and his County Power, no one ever *saw* that power, or can see even its picture, except in Sir *William Jones's Legal Means of Suppressing Riots,"* or in *"England's Ægis,"* or your *"Bill of Free and Sure Defence";* considering, I say, these circumstances, I shall, in the course of our conversations, have various questions to ask relative to this Element of our Polity, in which is found its physical strength.

C. I shall at all times be ready to discuss with you whatever belongs to it. For the present it may be best to proceed in our course: but NEVERTHELESS I must remark, that the foregoing element fully answers Mr. *Canning,* when, with a *Standing Army* at his back, and the *Manchester Body Guard of the Borough-mongers* at his beck, he, more like a low-minded protected bully, than an Englishman of a

(27) John Locke; Two Treatises of Government, book 2, sect. 212, p. 343.

lofty and generous spirit,—puts this taunting question to the patriot Reformers: "Do you mean to prevail by *reason,* or by *compulsion?* If," says he, "by *reason,* then reason is as GOOD *out of doors as in.*"

Note well, my friends, the complicated jesuitical insult!—"*Reason* is as *good* out of doors as in," says Mr. *Canning.* Were this, in an honest sense, true, England had been fairly represented, ere a thousand millions of her money had been profligately squandered for *quashing Reform* at home, and *crushing Liberty* in France! Were this flippant assertion true, such a revolution in England's landed property, and such a ruin of her farmers as no country ever before saw, would not now be near its final accomplishment, as we see before our eyes! But was not, on the contrary, this *"good"*—this unanswerable *"reason out of doors,"* always frustrated by the gagging bills, the libel bills, the suspending bills, and the indemnity bills of Mr. *Canning* and his *indoor* associates? Did they "prevail by *reason* or by *compulsion?"* How monstrous, then, the assertion! How unmanly the sneer, from one who, for thirty years past, has never heard the voice of "reason out of doors," when it spoke of Rights and Liberties, without stopping his ears, and skulking behind a mercenary army to defend him against it!

If *"reason,"* Mr. *Canning,* be *"as good* out of doors as in," then why, good Sir, shall not *"compulsion"* be so likewise? It was *"compulsion out of doors"* that persuaded the perjured *John* to sign Magna Charta. It was *"Compulsion out of doors"* that dethroned the second *Edward* and the second *Richard,* for deeds of folly and mischief. It was *"compulsion out of doors"* that put an end to tyrannical exactions of prerogative by *Charles* the First. It was "compulsion out of doors" that chased from the throne, and freed England from the tyranny of his bigoted son James.

What did not *"compulsion out of doors"* do for our kindred of *Anglo-America?* What is it not now

doing for all *South America, Mexico,* and heroic *Greece?*—Hath it not gloriously triumphed in *Spain* and *Portugal?*—Then, I pray you, Mr. *Canning,* to give us a *"reason,"* why,—since our Constitution so amply *provides* the means of *"compulsion out of doors,"* and therefore *commands it when necessary*—why, I pray you, should *"reason out of doors,"* when addressed to usurping Oligarchs, not prove so very *"good"* in their estimation as you say—why, I pray you—seeing that our same CONSTITUTION had required *every man* to be armed, and the aggregate to be organized in a *County Power,* as an infallible shield against oppression, and as means of *Resistance by physical force to Tyranny by physical force,*—shall we not have back that shield; that so, when necessary, we may apply a little of that same wholesome constitutional *"compulsion,"* before the Boroughmongers shall have pillaged the Nation of its last shilling, and *riveted around its neck a worse* than Algerine yoke?

As a preliminary to what is to be offered in support of the Third Element of the Constitution, it is necessary that we wholly divest ourselves of all ideas generated or contracted by the presence of an unconstitutional Legislature *de facto,* imposed on us by the legislative *revolution,* and the other *usurpations* effected by the *Norman* tyrant, who contrived not only to supersede the *Wittenagemote* of our Anglo-Saxon ancestors, but to lay a broad basis for succeeding aggravations of that great mischief; for it is the Wittenagemote that we must contemplate as our only proper Legislature *de jure;* without a recovery of which, it is manifest we cannot recover "that ancient Constitution, whereof our *Saxon* forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the *Norman.*"[28]

(28) Blackstone's Commentaries, Vol. 4, p. 420, 12th Ed., by Christian, 1795.

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